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Supreme Court of the United States

October Term 1958

No. 511

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Petitioners,

—*against*—

The steamtug LONG BRANCH, the RAILWAY CARFLOATS No. 61 and 50, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BJAX," the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents.

(and three related causes)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

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No. _____

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

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Respondents.

(and three related causes)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review so much of the judgments of the United States Court of Appeals for the Second Circuit entered in the above-entitled causes on July 14, 1958, as granted to respondents the right to limit their liability.

Opinions Below

The opinion of the District Court (Clancy, D. J.), not reported, is set out in Appendix A hereto, pages 1a-13a.

The opinion of the United States Court of Appeals for the Second Circuit (Circuit Judges Medina, Lumbard and Waterman) entered in these causes on July 14, 1958, is reported at — F. 2d — and is set out in Appendix B hereto, pages 1b-35b.

A petition by respondent Metropolitan Sand & Gravel Corporation for rehearing was denied on September 9, 1958. Respondent Central Railroad Company of New Jersey did not petition for rehearing.

The four judgments are reproduced in Appendix B at pages 36b, 38b, 40b and 42b.

Jurisdiction

The judgments of the Court of Appeals were entered on July 14, 1957. Petitioners' time within which to apply for a writ of certiorari was extended by this Court to and including November 12, 1958.

The Jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254(1).

Questions Presented

1. Where the Limitation of Liability Act denies the privilege of limitation to a shipowner held liable for damage if it occurs with his "privity or knowledge", may a court introduce the further element of intent and grant limitation on the ground that there was no "wilful fault" by the shipowner?

2. Is there privity of a shipowner which requires denial of limitation, under the Limitation of Liability Act, when a navigational error causing damage for which the

shipowner is held liable results from (a) the Master's lack of knowledge of currents where the shipowner has failed to provide the vessel with charts and current tables; or (b) the fact that the mental operations of the Master were affected by his chronic hypertension which was known to the shipowner's Medical Director and by sedatives the Master was taking on his doctor's advice?

3. When a tow and its tug belong to the same owner and are being operated as a flotilla in a common venture, and the tow obstructs and interferes with the navigation of another vessel causing damage thereto, is the owner of the flotilla required under the Limitation of Liability Act to include in his limitation fund the amount or value of his interest in the tow as well as in the tug?

Statute Involved

The statutory provision involved is Section 183(a) of the Limitation of Liability Act, 46 U. S. C. Rev. Stat. Sec. 4283, as amended.

> "§ 183. *Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel."*
>
> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."[1]

[1]Subsections (b) through (f) relate to loss of life and personal injuries, not applicable here because the Rincon Hills avoided collision but grounded in so doing.

Statement

These causes concern a loss by petitioners of over one million dollars, sustained when respondents' tugs, carfloats and scows crowded the Rincon Hills, embarassed her navigation and forced petitioners' ocean-going tanker, the Rincon Hills, aground on Dimond Reef in New York Harbor on November 26, 1951. The Rincon Hills was proceeding to her East River discharge berth through the waters between Dimond Reef (north of Governors Island) and Lower Manhattan. She was proceeding on the East River Range which is 300 feet northerly of Dimond Reef. The Range is provided for the specific purpose of guiding deep draft vessels safely past Dimond Reef.[2]

The Rincon Hills found her way blocked by the Metropolitan tow (the tug Metropolitan No. 2 with three loaded sand scows made up astern in single fashion) and by the Jersey Central tow (the tug Long Branch with two railroad carfloats, one made up on each side). Both tows were proceeding outbound from the East River and were meeting the Rincon Hills in the waters between Dimond Reef and Lower Manhattan, the Jersey Central tow being close astern and somewhat to port of the Metropolitan tow.

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[2]Attached to this Petition, as Appendix D, at page 1d, is a reproduction of the relevant portion of U. S. Coast & Geodetic Survey Chart No. 369 of the Hudson and East Rivers, to which Chart reference is made in the Opinion of the Court of Appeals. The Chart shows the area comprising the lower part of Manhattan, Governors Island, the Brooklyn shore, the waters between Governors Island and Lower Manhattan, Dimond Reef and the East River Range. The Range lights are a fixed red light at the outer end of Pier 11, Brooklyn (marked "FR" on the chart), and a fixed green light at a point on shore in the area of Pier 9 (marked "FG"). The green light is at a higher elevation than the red light. When the two lights are lined up, they form a "range" or a projected line which is used as a guide for deep draft vessels (the range being indicated on the chart by a solid line, running just north of Dimond Reef).

The Court of Appeals found that "The two tows involved in this case * * * were huge, slow-moving cumbersome flotillas and it requires little argument to demonstrate that they would constitute a substantial menace to the navigation of large vessels in the vicinity of Dimond Reef, especially on an ebb tide, unless kept clear of the Range." (5b)

The captains of both of these outbound tows were ignorant of the fact that the ebb current was still running out of the East River, and made no allowance for it. Neither tug had been furnished with available documents which would have shown that the ebb current was still running out of the East River. Both captains erroneously believed that it was slack water.

The captain of the Jersey Central tow was suffering from chronic high blood pressure, and was taking drugs which had the cumulative adverse effect of increasingly impairing his mental and physical reactions.

Having made no allowance for the ebb current still running out of the East River, respondents' tows were swept by the ebb current down to and across the center line of the deep water channel between Dimond Reef and Lower Manhattan, and even further south across the Range line (which line is only 300 feet to the north of Dimond Reef). The tows were then swept crabwise, along and south of the Range Line, across the path of the Rincon Hills.

The Rincon Hills blew a one-whistle signal to the tows. Neither tug blew a signal of its own and neither tug answered the Rincon Hills. Thereupon the Rincon Hills blew the danger signal and to avoid collision with the tugs and tows, the Rincon Hills was forced to stop her engines and to turn to her right, thus taking her off the Range, and directly toward Dimond Reef. Both tugs failed to answer the alarm signal of the Rincon Hills, and both tugs failed to take any action in response thereto.

The action of the Rincon Hills in turning off the Range and to her right toward Dimond Reef just barely avoided collision with the tows, the clearance being estimated to be as little as 10 feet.

When the Rincon Hills had been forced to the point where collision with the Metropolitan tow was just barely avoided and the Jersey Central tow was just pulling across the bow of the Rincon Hills, the pilot of the Rincon Hills ordered her engines put full ahead and her rudder hard left. The helmsman made a helm error which the Court of Appeals found was *in extremis*, and therefore excusable.

The owners of the Rincon Hills filed a libel in the United States District Court for the Southern District of New York to recover damages arising from the grounding. The District Court had jurisdiction under the provisions of the Judiciary Act of September 24, 1789, Title 28 U. S. C. 1333 (1), 63 Stat. 101, pertaining to admiralty jurisdiction of the District Courts, and the Limitation Statute.

Respondent Metropolitan Sand and Gravel Corporation appeared and answered the libel, claiming in the answer the right to limit its liability. Respondent Central Railroad Company of New Jersey did not answer the libel but, instead, filed three separate limitation proceedings seeking exoneration from or limitation of liability in connection with its tug Long Branch and its carfloats No. 56 and 61.

The District Court dismissed the libel and granted the petitions for exoneration from liability.

Upon appeal, the United States Court of Appeals for the Second Circuit reversed and held both respondents and their tugs Long Branch and Metropolitan No. 2 solely responsible for forcing the Rincon Hills aground on Dimond Reef.

The Court of Appeals in reversing found "that the tugs and tows seriously obstructed the navigation of the tanker and that the negligent operation of both the tug 'Metropolitan No. 2' and of the Railroad tug 'Long Branch' contributed to the grounding of the tanker on Dimond Reef" (Appendix B hereto, p. 10b), and that "the tows were at fault for not keeping away from the immediate vicinity of the Range, where they interfered with the navigation of the tanker" (Appendix B hereto, p. 18b).

The Court of Appeals found the Rincon Hills free from fault (Appendix B hereto, p. 26b).

The two tugs are allegedly worth about $130,000; and the carfloats and scows, together, about $350,000.

While thus finding respondents solely liable for petitioners' damages, the Court of Appeals nevertheless held that the respondents could not only limit their liability but could also restrict said liability solely to the values of the tugs "Long Branch" and "Metropolitan No. 2" and that the values of the carfloats and scows in the flotillas did not have to be included in the limitation fund.

Petitioners submit it was error to allow either respondent to limit its liability; and, further, to impose a limitation upon a limitation by allowing respondents to limit their liability solely to the value of the two tugs.

Reasons for Granting the Writ

1. In substituting "wilful fault" for "privity or knowledge", the Court of Appeals has greatly extended the class of cases in which limitation is available, and this would have far reaching effects upon shipping.

There is a substantial difference between the standard of "wilful fault" of the shipowner, as applied by the Court of Appeals in construing the Limitation of Liability Act, and the standard of "privity or knowledge" of the ship-

owner as provided in the Limitation of Liability Act. This difference is of vital importance in determining whether the shipowner is entitled to limit his liability, because the loss or damage may occur *with* the "privity or knowledge" of the shipowner, but *without* "wilful fault" on his part. Thus, the Act of Congress denies limitation even when the shipowner is held liable because of passive negligence; whereas such negligence would not meet the further element of intent added by the Court of Appeals in applying its standard of "wilful fault." In substituting "wilful fault" for "privity or knowledge", the Court of Appeals would open the door for limitation in many cases where said limitation is unauthorized by the Act. The Act itself is in derogation of the principle that where a wrongdoer is found liable for damages, said damages should be paid in full.

The difference between the standard applied by the Court of Appeals and the standard provided in the Limitation of Liability Act is of far-reaching importance to the vast number of shipowners, cargo interests and other persons who engage in the water-borne commerce—ocean, coastwise, river and lake—of the United States, and who participate in proceedings under the Limitation of Liability Act in the United States District Courts whose jurisdictions include the Atlantic, Gulf and Pacific Coasts, the inland navigable waters and the Great Lakes.

By construing the Limitation of Liability Act as providing a standard of "wilful fault" the Court of Appeals held that the respondents, having been found liable for errors of navigation committed by their tugs, in connection with failures concerning the competence of the tug masters and providing the tugs with charts and current tables, were nevertheless entitled to limit their liability because such failures were not "wilful fault" on the part of respondents.

Concerning Hutton, captain of the tug *Metropolitan No. 2*, and Molloy, captain of the tug *Long Branch*, the Court of Appeals stated (Appendix B hereto, p. 28b),:

"... We are still at a loss to understand how Hutton and Molloy miscalculated the current cycle; but the mere fact that they did so does not convince us that the failure to make further provision for Charts and Current Tables aboard these tugs was a *wilful fault* by the owners such as to deprive them of the benefits of the Limitation of Liability Act." (Emphasis added.)

Under the standard provided by the Limitation of Liability Act, a shipowner is not entitled to the benefits of the Act when the failure or negligence which causes the loss or damage occurs with the shipowner's "privity or knowledge", *regardless* of whether such failure or negligence also constitutes "wilful fault" on the part of the shipowner.

2. The decision of the Court of Appeals is in conflict with a prior decision of this Court, and with decisions of the Sixth and Ninth Circuit Courts.

The decision of the Court below in construing the Limitation of Liability Act as providing a standard of "wilful fault" on the part of the shipowner, is in conflict with the construction of such Act by this Court in *Spencer Kellogg Co.* v. *Hicks, Administratrix, et al.* (the *Linseed King*) 285 U. S. 502 (1932); the decision of the Court of Appeals for the Sixth Circuit in *Henson* v. *Fidelity & Columbia Trust Co.*, 69 F. 2d 778, 779 (1934); and the recent decision of the Court of Appeals for the Ninth Circuit in *The Pennsylvania*, 1958 A. M. C. 1775, not yet officially reported, the opinion being attached hereto as Appendix C, pp. 1c-12c.

In the *Spencer Kellogg* case this Court upheld denial of limitation to a shipowner by imputing to the shipowner the passive negligence of his local manager in failing to ascertain the presence of ice in the waters concerned and in failing to prevent navigation therein. There was no active

negligence on the part of the shipowner or of his local manager, and there could not, therefore, be any "wilful fault."

In the *Henson* case the Court of Appeals for the Sixth Circuit upheld denial of limitation to a shipowner for passive negligence in failing to test an appliance, the Court expressly rejecting the argument of the shipowner that he should be allowed to limit his liability because his conduct did not involve "either bad faith or willfulness".

In the *Pennsylvania* case the Court of Appeals for the Ninth Circuit held that a shipowner was not entitled to limit his liability because of failure to use due diligence to make the vessel seaworthy at the commencement of the voyage. The Court cited and followed this Court's decision in the *Spencer Kellogg* case, and made no reference whatever to "wilful" fault. The opinion of the Ninth Circuit was written after a second re-hearing and indicates that a definitive opinion by this Court is necessary to bring future decisions of the various Circuits into harmony.[3] The court held that failure to inspect or discover a defective condition constitutes "privity or knowledge"; and that where such failure involves a non-delegable duty and constitutes the proximate cause of the damage, the shipowner is denied the right to limit his liability.

A shipowner has a non-delegable duty to make his ship seaworthy by equipping her "with adequate navigational data" for the waters in which she is navigating, (*Weyerhaeuser Timber Company* v. *Steamship W. W. Bruce*, 94 F. (2d) 834, 837, certiorari denied 304 U. S. 567) and "to man his ship with competent officers and crew," *United States* v. *Black Diamond S. S. Corporation*, 178 F. (2d) 243, 252.

This clearly illustrates the error of the Court of Appeals in construing the Limitation of Liability Act to provide a

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[3]We understand that application for a writ of certiorari will be made in the *Pennsylvania* case and that the time for making such application does not expire until November 18, 1958.

standard of "wilful fault". Since the duty of a shipowner to employ a competent tug captain is a non-delegable duty, the shipowner continues to be liable with respect to such failure, notwithstanding the "good faith" of his Medical Examiner (Appendix B hereto, p. 29b).

As to the physical and mental competence of Molloy, captain of the tug Long Branch, the Court of Appeals stated (Appendix B hereto, p. 24b):

> "It is still difficult to understand Molloy's persistence in following close behind the sand scows and to port of the sand scows. With the power at his disposal, and the fairly light load as compared with a full load of 17 cars, he could easily have passed the sand tow to starboard and got out of the tanker's way. It is not unlikely that his mental operations were affected to some extent by his chronic hypertension and by the sedatives he was taking on his doctor's advice."

The duty of an owner to furnish aboard his vessel essential charts and tide or current information being a non-delegable duty, he continues liable for such a failure notwithstanding the availability of such charts and tide or current information at the Dispatcher's office but not aboard the tug. This Court in *The Britannia*, 153 U. S. 130, 135 (1894) held that those in charge of the navigation of a vessel are "bound to know" the condition and effect of the tide and tidal currents in the waters concerned.

In the present case there is a direct relationship between the missing current data, the tug captains being unaware of the ebb current, and the tows being carried across the range by the current, thereby forcing the tanker aground.

The shipowner's duty being non-delegable, he is himself "privy" to the breach of such duty even though the failure or negligence may be that of someone acting for him.

3. Confusion exists concerning the 39 year old decision of this Court in *Liverpool, Brazil & River Plate Steam Navigation Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48 (1919) because the decision is not "in keeping with the realities," has not been followed in contract cases, and causes inequities. The Court of Appeals recognized that modification or reversal of the *Liverpool* case is a matter for consideration by this Court.

The Court of Appeals found that "the tugs and tows seriously obstructed the navigation of the tanker" (Appendix B hereto, p. 10b) and that "the tows were at fault for not keeping away from the immediate vicinity of the Range, where they interfered with the navigation of the tanker" (Appendix B hereto, p. 18b). The Court was opposed to the result required by the holding of this Court in the *Liverpool* case, and stated (Appendix B hereto, p. 33b):

> "If the question were an open one we would be disposed to include the whole flotilla if we could, especially in the case of the carfloats, but we must take the law as we find it, and the question is no longer open." (citing the *Liverpool* case).

The Court of Appeals felt that it was not within its province to depart from the decision of this Court in the *Liverpool* case.

The Court of Appeals recognized that the construction of the Limitation of Liability Act by this Court in the *Liverpool* case was not "in keeping with the realities of this particular case." (Appendix B hereto, p. 33b), but also recognized that modification or reversal of the construction in the *Liverpool* case would be a matter for determination by this Court.

The construction of the Limitation of Liability Act in the *Liverpool* case has not been followed by this Court or by lower Courts in cases where an employee-employer

relationship exists, or where the claimant has paid for the transportation of himself or his property. In such cases, the owner must surrender into the limitation fund his interest in *both* the tow and the tug. *The Big Chief*, 75 F. Supp. 496 (E. D. Mo. 1948); *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548, 2nd Cir. 1933 cert. den. 290 U. S. 704 (1934); *The Bowling Green*, 11 F. Supp. 109 (E. D. N. Y. 1935).

The distinction between these "contract" cases and "tort" cases is tenuous indeed. For example, giving effect to such distinction, any injured claimants aboard the Rincon Hills would have had to share in a fund limited solely to the value of the tugs. On the other hand, had any persons *aboard the tugs or tows* lost their lives or sustained personal injuries (which loss of life and personal injuries were spared solely because of the action taken by the Rincon Hills to avoid collision) such death and personal injury claimants would have shared in a limitation fund comprising the value of *all* of the craft in the flotilla, *Standard Dredging Co.* v. *Kristiansen, supra.* To rest the amount of recovery on such a distinction seems unrealistic indeed, and outmoded under present day circumstances.

The tug Metropolitan No. 2 was towing three scows, all of which were commonly owned, "made up in tandem and 'fast up close to each other' with hawsers and cross lines—a flotilla of about 500 feet overall." (6b)

The tug Long Branch and the two carfloats, all owned by respondent Central Railroad Company of New Jersey, comprised one unit or vessel, the tug being in the middle and all three craft being firmly lashed together. The bows of the carfloats were drawn together so as to form the bow of the flotilla, and the tug Long Branch, placed between the sterns of the two carfloats, served as the propelling power and rudder of the one unit or vessel.

The Court of Appeals held that respondent Metropolitan Sand & Gravel Corporation, as owner of the tug Metro-

politan No. 2 and the scows, and respondent Central Railroad Company of New Jersey, as owner of the Long Branch and the carfloats, were both entitled to the benefits of the Limitation of Liability Act. Even if this holding were to be upheld by this Court, the fact that the tug Long Branch and the carfloats together comprised one unit or vessel, requires that the interest of respondent Central Railroad Company of New Jersey in the carfloats is to be included in the limitation fund as well as respondent's interest in the tug Long Branch. The same applies in requiring Metropolitan Sand & Gravel Corporation to surrender the values of the scows. Furthermore, in construing the Limitation of Liability Act, the phrase "such vessel" refers to each vessel whose presence constituted, as found by the Court of Appeals (5b) a substantial menace to navigation.

4. The question concerning the extent to which a shipowner may limit his liability is of International importance. England and Canada, in such a case as here concerned, base the size of the limitation fund upon the whole flotilla, contrary to the holding in the Liverpool case. Uniformity of International maritime laws would seem desirable, especially in view of the opening of the St. Lawrence Seaway.

The question of whether the owner of a flotilla consisting of a tug and tow is required under the Limitation of Liability Act to include in the limitation fund the amount or value of his interest in the tow as well as in the tug is of special and widespread importance at this time, because the St. Lawrence Seaway has now been opened and will shortly be completed. The Seaway will not only substantially increase the volume of traffic on the Great Lakes, but also makes it most desirable that this important question be reviewed at this time, so that this Court may give consideration to whether there should be uniformity between the Maritime Law of the United States and that of Canada.

Under the Maritime Law of Canada, where the tug and tow belong to the same owner and the presence of the tow is a contributing factor to the casualty, the limitation fund is calculated on the tonnage of *both* tug and tow. See the *A. L. Smith and Chinook*, 51 S. C. R. 39 (Canada 1915); *The Pacific Express* v. *The Tug Salvage Princess*, 1949 Exch. C. R. 230 (Canada Law Reports, 1949).

The rule is the same under the Maritime Law of Great Britain. See *The Ran*, [1922] P. 80; *The Harlow*, [1922] P. 175; *The Alde*, [1926] P. 211.

These questions are of vital importance to shipowners whose vessels encounter such tug and carfloat in the harbors, rivers and Great Lakes of the United States.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that their petition for a writ of certiorari be granted.

November 10, 1958

Respectfully submitted,

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Counsel for Petitioner

MACDONALD DEMING,
GORDON W. PAULSEN,
RICHARD G. ASHWORTH,
Of Counsel.

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket Nos. A. 171-47, A. 173-80, A. 173-81, A. 173-82, A. 175-68

DEEP SEA TANKERS, LIMITED, in its own behalf as owner of the Steamtug RINCON HILLS, and as bailee of the cargo laden thereon and SHELL OIL COMPANY, INC., as charterer of said vessel,

Libellants.

—against—

The Steamtug LONG BRANCH, the Railway Carfloats No. 61 and No. 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the Steamtugs METROPOLITAN No. 2 and METROPOLITAN No. 3, the Sand Scows GG-202, GG-150 and GG-104 and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents.

In the Matter of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the steam tug LONG BRANCH, for exoneration or limitation of liability.

In the Matter of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR OF N. J. No. 56, for exoneration from or limitation of liability.

In the Matter of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR of N. J. No. 61, for exoneration from or limitation of liability.

ATLANTIC STEVEDORING CO., INC.,

Libellant,

—against—

The Tanker RINCON HILLS, her engines, etc., and DEEP SEA TANKERS, LIMITED,

Respondent,

—and against—

The Tugs METROPOLITAN No. 2, METROPOLITAN No. 3 and LONG BRANCH, the Scows GG-202, GG-150 and GG-104; and Carfloats CRR of N. J. No. 51, and CRR of N. J. No. 56,

Respondents Impleaded,

—and against—

METROPOLITAN SAND AND GRAVEL CORPORATION and THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondents Impleaded.

OPINION

JOHN W. CLANCY, U. S. D. J.

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MESSRS. MACKLIN, SPEER, HANAN & McKERNAN,
Proctors for Metropolitan Sand & Gravel Corporation,
99 John Street,
New York, N. Y..

LEO F. HANAN, ESQ., and
CHARLES J. CARROLL, JR., ESQ.,
of Counsel.

MESSRS. HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON,
Proctors for Atlantic Stevedoring Co. Inc.,
96 Fulton Street,
New York, N. Y.

THOMAS H. MIDDLETON, ESQ., and
ALLAN B. LUTZ, ESQ.,
of Counsel.

CLANCY, D. J.

This proceeding involves five related suits, all arising from the grounding of the tanker RINCON HILLS on November 26, 1951. They were consolidated for trial. The owner and charterer of the RINCON HILLS filed a libel

against Metropolitan Sand & Gravel Corporation, two tugs and three sand scows owned by Metropolitan, and against Central Railroad of New Jersey, a tug and two carfloats owned by it. Metropolitan answered the libel as respondent and as claimant of its vessels. Central Railroad of New Jersey did not answer the libel but instead filed three separate petitions for exoneration from and/or limitation of liability on behalf of each of its three vessels named in the libel. The fifth related suit was a libel brought by Atlantic Stevedoring Co., Inc., against the RINCON HILLS and its owners, in which the tugs owned by Metropolitan and the Jersey Central were impleaded.

FINDINGS OF FACT.

1. Shortly after noon on November 26, 1951 the tug METROPOLITAN No. 2 owned by the respondent Metropolitan Sand & Gravel Corporation, proceeded south in the East River. Her tow consisted of the three respondent scows loaded with sand, made up in tandem fashion close to each other. It was towed on two hawsers about 100 feet long. The tow thus had an overall length of 500 feet. The tug had 650 horse power. The tow was proceeding down river favored by the last of the ebb tide and in clear weather. When off pier 8, New York, the tug's master perceived the RINCON HILLS, a tanker, then about 1000 feet west of the light at the northwest corner of Governors Island. The METROPOLITAN No. 2 at that time was about 400 feet off the piers and at this point it began to pull in to starboard to South Ferry to proceed around the Battery. The Manhattan shore at this point veers sharply to the west so that his starboard wheel did not diminish its distance from the pier ends. When off pier 4 with her tow following relatively straight behind, the tug captain heard a one-blast signal from the RINCON HILLS.

He did not answer, assuming from the respective positions of tanker and tow that the blast was not intended as a signal directed at him. He proceeded to and around the Battery and into the North River, maintaining a distance of approximately 500 feet between his tug and tow and the pier line and the Battery Sea Wall.

2. Coming down river at the same time was the Central Railroad of New Jersey tug LONG BRANCH with a tow consisting of two car floats, one made up on either side. Each of the floats is 290 feet long on deck and with a beam of 40 feet, without means of propulsion or control. One float was empty. The other float had on her middle track near her bow, two empty steel coal cars and a loaded box car. The bows of the floats were made fast close together so that the tow was approximately 80 feet wide at the bow and 115 feet at the stern. Passing piers 8 and 9 on her way down river, the tow was something more than 500 feet off the pier ends. Below pier 9 it angled to starboard toward the Battery. When it was off pier 9, its pilot noticed the RINCON HILLS down in the Bay and then initiating a right turn. When the LONG BRANCH tow reached pier 5 it was 700 feet off the pier end because though she was moving to starboard the Manhattan shore angle of recession was greater than the angle of her course. When the LONG BRANCH tow was below pier 5 and its direction was westerly, the RINCON HILLS blew a single blast of her whistle. This whistle was not addressed to the LONG BRANCH or to any particular vessel but was only to warn all traffic in the East River of the RINCON HILLS' approach. The LONG BRANCH did not answer the whistle and this omission was in no respect negligent since the LONG BRANCH was not on a crossing course with respect to the RINCON HILLS nor head to head nor on any other course that required a signal. The LONG BRANCH tow negotiated her right turn into the Bay, be-

hind and to the port of the sand tow. In the course of this turn she passed the RINCON HILLS which was then on the Range, port to port about 200 feet off her bridge, near the long rack at South Ferry. She then proceeded to her destination in Jersey City.

3. The tanker RINCON HILLS, 523½ feet long and 68 feet beam, had come north from the quarantine anchorage in the control of a tug captain acting as pilot. She was making ten knots an hour when she arrived at the northwest corner of Governors Island where the pilot started a right turn to put himself on the Range intended to direct deep vessels away from the Dimond Reef north of Governors Island. Making this turn reduced the vessel's speed one knot so that at its conclusion she was running nine knots an hour and her heading was being held ten degrees to the left of the Range in order to avoid the expected effect of the ebb tide. Half way through this turn the captain blew a single blast intended to advise the traffic in the East River of his arrival and intent to navigate into the River. In the position of his heading at the time he blew this blast, any traffic in the East River, south of pier 5, more than 350 feet off the pier ends, would be to his starboard bow. He saw the LONG BRANCH tow in that relative position and blew four short blasts, intended, to use his own language, to take in "whatever was on the portside. It was a warning because they weren't giving me any break at all so far as the room was concerned." The four blasts were also an expression of his acute apprehension upon his realization of his own excessive speed. Immediately after he stopped his engines and ran two minutes with the engines stopped and with the ship heading under an amidships wheel steady on the deep water Range when he had made it. The stopping of his engines had had no more effect then reducing his speed less than one knot and the tide may possibly have had some effect also so that after the two minutes

running without power, the tanker was still moving at a speed of at least 7½ knots. The LONG BRANCH tow had by that time passed to his port and when it was opposite his bridge he ordered his engines full ahead and his helmsman to go hard left. This order was given at precisely the point where he, an experienced docking pilot, always turned left from the Range. The engines were put full ahead but unfortunately the helmsman turned the wheel a full sharp right, and the RINCON HILLS, to use the expressive colloquialism of a tug captain, "took a nosedive" to starboard and ended up on the reef one and a half minutes after the full ahead order for the engines was effectuated.

4. The LONG BRANCH and the RINCON HILLS were never in a crossing position or in a head to head position or in any position that required a navigating signal from the LONG BRANCH. When two vessels are moving in opposite directions on adjacent arcs there comes upon each of them an instant when its head is directed at the other vessel. The RINCON HILLS never had the slightest doubt about the course of the LONG BRANCH and even if the LONG BRANCH were deemed at fault at failing to whistle a signal to the RINCON HILLS, such failure did not contribute in the slightest to the tanker's navigation or grounding.

5. The respondent tug, METROPOLITAN No. 3, had pursued the respondent METROPOLITAN No. 2 and its tow down the river, around the Battery and in the North River disengaged one of the scows from the tow, in accordance with an agreement made between the pilots of the tugs though the office had directed the METROPOLITAN No. 3 to put off the scow further down the Bay. Its performing its task in the North River did not have any effect whatever on the speed or the course of the METROPOLITAN No. 2 which has been found faultless.

6. Attending the RINCON HILLS were two tugs owned by the same owner, one of which had furnished the pilot of the RINCON HILLS. That tug had proceeded north from quarantine and mid-way in the bay it went on the port side of the RINCON HILLS and was promptly ordered to resume its position to the tanker's starboard. The other tug had waited fifteen minutes for the arrival of the RINCON HILLS from a position 500 feet off the Battery Sea Wall. It was the intended job of both these tugs to assist the RINCON HILLS in negotiating its turn into the river and hold her up in the ebb tide as well as to control her sluggish steering. The RINCON HILLS pilot used neither.

7. The grounding of the RINCON HILLS was due entirely to the faulty navigation of the pilot in charge, his failure to exercise due care in earlier reducing her speed, his failure to use properly the tugs supplied for his use by the owner of the RINCON HILLS, the grossly negligent allowance of the helmsman's erroneous maneuver, and the failure of the officers in or near the pilot house timely to notice the helmsman's error when it occurred or until correction of it was too late. The RINCON HILLS never at any time navigated with respect to the METROPOLITAN tow. There was nothing in the conduct of the LONG BRANCH tow that contributed in any way to the grounding. That tow was handled with all due care with respect to itself and to the RINCON HILLS.

8. Before November 28, 1951, two days after the stranding of the RINCON HILLS, the Atlantic Stevedoring Company was engaged on the steamships TULANE and TRAFALGAR at piers 36 and 37, Atlantic Basin. Some of its cargo nets dangled in the waters of the Basin which became covered with oil. By order of the Fire Department the ropes were destroyed and the libellant, Atlantic Stevedoring Company suffered the loss of their value. The Court has

reached the conclusion that identification of the oil as that from the tanker RINCON HILLS was not established and foreseeability and causation by the tanker's neglect are doubtful.

CONCLUSIONS OF LAW.

1. The libel of Deep Sea Tankers, Limited and Shell Oil Co. Inc., as owners and charterers of the RINCON HILLS, is dismissed as to all respondents named therein, with costs to the respondents Metropolitan Sand & Gravel Corporation and METROPOLITAN No. 3.

2. The petitions for exoneration from liability of the tug LONG BRANCH and the carfloats No. 56 and No. 61 are granted with costs to the Jersey Central.

3. The libel of Atlantic Stevedoring Co., Inc. against the tanker RINCON HILLS and Deep Sea Tankers, Limited, is dismissed with costs and the impleading petitions against the Jersey Central and Metropolitan tugs are dismissed without costs.

The liability in this case has been determined largely on the testimony of the libellant's witnesses. When the RINCON HILLS pilot testified before the Coast Guard eight days after his vessel's grounding, he was subject to every impulse and inducement to find a reason for the deviation from his course that resulted in his vessel reaching the reef. He never gave any reason for it except the helmsman's disobedience or mistake that resulted in his hard left wheel order being executed by a hard right wheel with his engines at full speed ahead. At that hearing his own counsel supplied him numerous leads to complain about the railroad car float. He rejected all of them and persisted from beginning to end in testimony that was well summarized by his own statement: "She didn't go hard left. That's all I know."

That the railroad float had passed him relatively long before the giving of his hard left order is demonstrable from his own testimony and from the charts which he marked and upon which he fixed the vessels' positions at different times. When he gave the alarm signal he fixed on a chart the position of the railroad float 2800 feet in front of him. The Court is not inclined to hold witnesses to exactness when marking a chart, but the pilot was the only witness who could testify to the position of the car float tow when he blew the alarm so we are accepting his testimony as his approximation of the distance between the tanker and the tug. Thus the pilot's drawing indicates a crossing of the Range to the east by the LONG BRANCH when the single blast was blown and crossing back to the west when the alarm was blown, he says, thirty seconds later. This seems to the Court an impossibility and renders both whistle signals unintelligible. Returning to the position of the float when he blew the alarm, his testimony is that at that point he then stopped his engines. Two minutes afterwards he gave the left wheel order. We put his speed at 7½ knots which he was certainly doing and he had passed the railroad float before giving the left wheel order. The speed of the railroad float we have calculated from the time of its start and and of its reaching Jersey City. We have allowed 5 miles per hour at the foot of the East River and in the two minutes between the alarm signal and the left wheel order of the RINCON HILLS, the car float would have gone 900 feet on an arc from and below pier 4. This would have put her down near the long rack at South Ferry and passing the RINCON HILLS there as we have found. This agrees with the testimony of the LONG BRANCH captain whereas any supposition that the LONG BRANCH had crossed the Range and returned would require a matter of at least two minutes more to put the LONG BRANCH in that position. This fact is found as well in the testimony of the tanker's master which is most important. He ran

from his chartroom when he heard the alarm and saw the railroad float off the starboard bow. He never saw the METROPOLITAN float. If the master of the vessel could not see METROPOLITAN then it means that tow was never in the picture. How and why he saw the railroad float has been shown. He watched the railroad float approach and pass on the port side of his vessel without asserting his authority in any way. If his vessel was in any danger from the tow he would certainly have suggested or taken measures to avoid it. It never was in danger from the tow. The master's statement by the way that this vessel was always swinging cannot be made to accord with the midships rudder. The tanker's speed is confirmed by her pilot and by the only relevant portion of the testimony of the experts produced by the libellant. When all their testimony is digested, her speed at the time of the hard left order was put at about seven and one-half knots.

Despite his failure to deny or distinguish any of his answers to interrogations before the Coast Guard, the pilot changed the substance of his testimony at the trial. We refer especially to his alleged movement to starboard after the alarm and before he put his rudder midships. This is not accepted because it is an outright contradiction of his original testimony at the Coast Guard hearing and of its repetition by asserting the truth of that testimony at the trial. The helper tugs which were never employed by the RINCON HILLS pilot were there to assist in effecting a safe turn into the East River. This is evident from the fact that when the attending tug took up a position on the vessel's port during its progress up the Bay, it was ordered to the starboard side by the pilot. The other tug waited fifteen minutes either off the Battery or at a dock there as one witness put it. There is no explanation for the presence of the two tugs with the tanker at the Battery except that they were furnished for use by the pilot to manage the turn into the river of this admittedly deep-laden and slug-

gish vessel. The testimony of the attending tug's pilot confirms every finding we have made and the overall testimony of the other tug's master we regard as in accord.

The testimony of the libellant's experts, except in as much as they established the speed of the RINCON HILLS, is unimportant because all of it was incorporated in a wholly irrelevant hypothetical question which presented to the Court a hypothetical case only and not a navigating problem of the RINCON HILLS. Without accentuating any of its other deficiencies, such as the right turn we have refused to find, the single assumption of a half minute or less for the full speed ahead of the engine movement of the tanker that preceded the grounding, destroys the validity of the conclusions reached by the experts. Whatever her bridge engine log book is supposed to disclose, her engine movement book shows that the engines were at full speed for a minute and a half and the engineer's story of the underscoring of the moment of its initiation is not only unsatisfactory on its face but is contradicted by the testimony of the tanker's master who said he stopped the engine immediately when he felt the vessel ground. He certainly felt that as soon as did his engineer.

One of the experts explained the effect of a full ahead motion of the propeller after the vessel was running with a stopped engine. The idea intended to be conveyed was that the hull moved sideways onto the reef. This vessel was moving at seven and a half knots and maybe the right rudder was operating before the propeller took over. The master of the tanker said the stem turned. And the pilot of the accompanying tug that was well up toward the bow was not talking of a sidewise motion when he described the vessel's motion as a nose dive and when he was graphically describing his hurrying to starboard to secure his own safety and that of his tug. He was avoiding the

tanker's stem. The testimony of the men who were at the scene cannot be contradicted by an uncertain hypothesis.

Little need be said of the other witnesses produced by libellant. They were partisan. The ferry pilots displayed animus and withered under cross examination.

Molloy was a straightforward witness who gave direct responsive answers. He said he did not hear the single blast. We cannot say that he did. He put the RINCON HILLS in the wrong place when she blew her alarm. We suppose most mariners would notice an alarm. He thought it was a signal to the attending tug calling it up for service, a quite intelligent conclusion at the time. Molloy himself was where he had a right to be and was not interfering with the tanker in any wise. In such circumstances he might well have noticed the signal without fixing her place too nicely. So far as the tide and its effect at the Battery goes, we believe this veteran of forty years of tug piloting in New York Harbor without a demerit for navigation probably knew as much about it as libellant's experts. His testimony we believe we have demonstrated was implicitly confirmed in the crucial respects of time and space by the RINCON HILLS pilot.

Nothing in the case distracts from the helmsman's error and nothing minimizes its effect.

The libel is dismissed.

Dated: New York, N. Y.,
June 20, 1956.

JOHN W. CLANCY
United States District Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 8, 9, 10 and 11—October Term, 1957.

(Argued December 10 and 11, 1957

Decided July 14, 1958.)

Docket Nos. 24439, 24440, 24441 and 24442

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Libelants-Appellants,

—against—

The steamtug LONG BRANCH, the RAILWAY CARFLOATS No. 61 and 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" *and* "BJAX," the sand barges "A," "B" and "C," and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents-Appellees.

In the Matter

of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the Steamtug LONG BRANCH for exoneration from or limitation of liability.

In the Matter

of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR of NJ No. 56, for exoneration from or limitation of liability.

In the Matter

of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR of NJ No. 61, for exoneration from or limitation of liability.

Before:

MEDINA, LUMBARD and WATERMAN,
Circuit Judges.

Appeal from a decree of the United States District Court for the Southern District of New York, in Admiralty. John W. Clancy, *Judge*. Opinion below reported in 1956 A.M.C. 1723. Reversed and remanded.

CHARLES S. HAIGHT, New York, N. Y. (Robert M. Julian, Gordon W. Paulsen, Richard G. Ashworth and Haight, Gardner, Poor & Havens, New York, N. Y., on the brief), *for libelants-appellants.*

LEO F. HANAN, New York, N. Y. (Charles J. Carroll, Jr. and Machlin, Speer, Hanan & McKernan, New York, N. Y., on the brief), *for respondent-appellee Metropolitan Sand & Gravel Corporation.*

GERALD J. MCKERNAN, New York, N. Y. (Vincent E. McGowan, New York, N. Y., on the brief), *for respondent-appellee Central Railroad Company of New Jersey.*

MEDINA, *Circuit Judge:*

On November 26, 1951, shortly after twelve o'clock noon, the "Rincon Hills," a Canadian tanker, grounded on Dimond Reef, off Governors Island in New York Harbor, and the damage to the ship and cargo is said to exceed one million dollars. Deep Sea Tankers, Limited, as owner of the "Rincon Hills" and bailee of her cargo, and Shell Oil Company, Incorporated, as charterer, within a few days filed a libel against certain tugs and tows of Central Railroad Company of New Jersey and Metropolitan Sand & Gravel Corporation, and against the Railroad Company and Metropolitan, asserting liability for the grounding because of alleged crowding and interference with the navigation of the "Rincon Hills" as she passed along the East River Range for deep draft vessels in her course up the East River. Three proceedings for exoneration from or limitation of liability were then brought by the Railroad Company on behalf of her tug and two carfloats; Metropolitan answered the libel of Deep Sea Tankers, and in the answer included a prayer for relief by way of limitation of liability to the value of Metropolitan's interest in her tug and three sand scows, in the event that they should not be exonerated. There was no separate limitation proceeding initiated by Metropolitan. The above described causes, together with another not involved on this appeal, were consolidated and tried together before Judge Goddard who died on August 26, 1955, after the conclusion of the trial but before the submission of briefs or other argument by counsel. It was stipulated that the

case would be submitted to Judge Clancy on the trial record made before Judge Goddard and, upon this record and the briefs of counsel, but without oral argument, Judge Clancy found the "Rincon Hills" solely at fault, exonerated the two tugs and tows and dismissed the libel. This appeal by libelants followed and, on motion of appellees, we have already held that Judge Goddard's trial notes formed no part of the trial record stipulated to be considered by Judge Clancy and hence are not part of the record now before us. 242 F. 2d 433.

Since the opinion and findings below are based upon the cold record alone, without the benefit of seeing and hearing the numerous witnesses who testified before Judge Goddard, and, as this Court has noted, "we have an eventual responsibility for the facts as well as for the law," *The Bellhaven*, 72 F. 2d 206, 209; *Thorne, Neale & Co. v. Reading Co.*, 2 Cir., 87 F. 2d 694, 696; see also *The Secandbe*, 6 Cir., 102 F. 2d 577, 581, we have carefully read and studied the entire transcript of 6793 pages and the 196 exhibits and have made new findings of fact in accordance with the clear weight of the evidence. Because of the unusual circumstances to which reference has just been made, we shall set forth our findings in considerable detail.

A bird's eye view of the area within which the tanker and the tugs and tows were proceeding to their respective destinations is given by Chart 369 of New York Harbor. The "Rincon Hills" had left her anchorage at Quarantine in the Narrows, bound for 138th Street, East River; her intended course was through the Upper Bay, past Governors Island, along the East River Range for deep-draft vessels, past Dimond Reef and thence up the East River. The Railroad steamtug "Long Branch" and the two carfloats were following and gradually overtaking the Metropolitan diesel tug with three fully loaded sand scows as

they passed under the Brooklyn Bridge down the East River; the destination of the Railroad flotilla was the yards in Jersey City, New Jersey, in a general westerly direction from the Battery, and that of the sand tow was a meeting place with another Metropolitan tug off the Battery, where one of the three sand scows was to be transferred to the other Metropolitan tug. A seemingly wide expanse of open water between the Battery and Governors Island, where small craft may go at will, is disclosed by Chart 369 to be in fact an exceedingly narrow passage for vessels of deep draft. Dimond Reef, in 24 to 27 feet of water, juts out like a sore thumb and the East River Range, with a steady 40 feet of water, is obviously designed as an indispensable aid to navigation for sea going vessels as they proceed up the East River. In terms of fairway for such vessels as they steam up and down stream is little more than 325 yards of deep water between the Range and the relatively shoal area in the neighborhood of the piers and ferry slips in the vicinity of the Battery. The Governors Island Ferry, the Ellis Island Ferry and the Staten Island Ferry all operate across the westerly end of the Range or thereabouts and they as well as most small craft are readily maneuverable and can quickly get out of the way of large steamers or tankers. The two tows involved in this case, however, as will shortly appear, were huge, slow-moving, cumbersome flotillas and it requires little argument to demonstrate that they would constitute a substantial menace to the navigation of large vessels in the vicinity of Dimond Reef, especially on an ebb tide, unless kept clear of the Range.

The "Rincon Hills" was a fully loaded turbo-electric tanker of 10,653 gross tons, 523.5 feet in length and 68.2 feet abeam, drawing 29.8 feet of water forward and 29.9 aft.

The diesel tug "Metropolitan No. 2," of 650 horsepower and 144 gross tons, was 80.6 feet long, beam 23 feet, depth 9.6 feet; the hawser connecting her with the sand scows was 12 to 15 fathoms in length; the scows C-G 202, C-G 150 and C-G 104 respectively 112, 113.4 and 113.3 feet long, fully loaded, were made up in tandem and "fast up close to each other" with hawsers and cross lines—a flotilla of about 500 feet overall. The other dimensions of the sand scows were: C-G 202, 320 gross tons, beam 33.1, depth 8.8; C-G 150, 308 gross tons, beam 32 feet, depth 8.9 feet; C-G 104, 327 gross tons, beam 32 feet, depth 9.4.

The steam tug "Long Branch," of 950 horsepower and 229 gross tons, was 104.2 feet long, beam 25.7, depth 14.2. The carfloats Central 56 and Central 61 were of identical dimensions and of steel construction, 291 feet long, beam 40 feet, depth 10.6 feet. Each was a 3-track float, with a capacity of 17 freight cars. There were two empty coal cars and one loaded freight car on one of the floats, the other was light. The floats were on either side of the "Long Branch," all three tightly lashed together, with the bows of the floats brought nearly together ahead of the stem of the "Long Branch," which forced out the sterns of the floats fanwise. There are certain minor discrepancies and contradictions in the record respecting some of the figures, but they are substantially accurate. The sand scows and the carfloats were passive instruments without propulsion equipment of any kind.

At this point we think it will be helpful to separate the facts we deem beyond all reasonable doubt established by the record, so that the more controversial features of the case may be discussed against what we consider to be an unassailable background.

(1) The "Rincon Hills" sounded a single whistle blast, followed by the danger signal of four or five short blasts;

and there was no response to either of these signals by either of the two tugs.

(2) As the two tows proceeded downstream the Railroad carfloats gradually came closer and closer to the sand tow, intending to pass to port of the sand tow; and the carfloats did pass to port of the sand tow, the actual passing taking place after the carfloats went under the bow of the "Rincon Hills."

(3) The stem of the "Rincon Hills" barely missed collision with the carfloats as they crossed her bow.

(4) It was clear weather, with excellent visibility and a fresh westerly wind; the current was running on the ebb a full knot and a half in the direction of Dimond Reef, a fact which the masters of the two tugs did not take into consideration, as it was just about dead low water at the Battery and the two masters of the tugs, who knew it was about low tide, were not aware of the fact that the current continued to run on the ebb well over an hour after low water at the Battery.

(5) Just as or immediately after the carfloats crossed the tanker's bow the pilot gave the order "hard left, full ahead," which was repeated by the second officer and by the helmsman; but the helmsman, because of a "reaction" or intuitive fear of collision, disobeyed the hard left order and put the wheel hard right.

(6) The pilot in charge of the navigation of the "Rincon Hills" was a man of ripe experience, thoroughly familiar with New York Harbor and the set of the current on and near the Range. The masters of the Railroad and Metropolitan tugs were old hands at their trade and should have known what they were about.

General Observations

There were many witnesses, several on board the tanker. The sounding of the danger signal alerted some of these witnesses to the fact that something unusual was going on. Some of them were on the tows or on ferryboats in the vicinity, one was in his office on the top floor of the Whitehall Ferry Building on shore. Obviously, some of these witnesses were interested; they varied as to intelligence, accuracy of observation and ability to understand the questions, some of which were highly technical. There was an almost universal and quite bewildering disposition by practically all eye-witnesses to guess at distances and time intervals in terms of seconds or minutes. The documentary evidence is, as always, important and we have been particularly impressed by the tanker's Bridge Bell Book. We reject the charge by appellees that the claim of crowding was manufactured out of whole cloth as an afterthought, and that the entries in the Bridge Bell Book were deceptively written up after the event to support the allegedly fictitious claim of crowding and to cover up the "wrong wheel movement of the helmsman." On the other hand, we take such colorful expressions in the testimony as "this carfloat came shooting across the bow of the ship," and "the ship took a nosedive," to be no more than rhetorical flourishes of little consequence or significance.

Except for those charged with the responsibility of navigating the tanker and the two tows, who were under a duty to observe other traffic in the East River, there was nothing to attract the attention of anyone to the scene off Dimond Reef until the danger signal was given. Thus the danger signal alerted some, including the master of the tanker, who was at that time in the chart room abaft the bridge, and the purser, who was in his stateroom counting money. The close proximity of the tanker and the carfloats when a

collision seemed unavoidable drew the attention of others to what occurred immediately prior to the grounding. Doubtless the attention of many others was attracted after the vessel grounded and was motionless. We have necessarily viewed with some skepticism elaborate descriptions, by witnesses not then aboard the tanker or the tows, of the relative positions of the vessels at various times prior to the grounding as honest but at least to some extent unreliable. Viewed from another angle, it seems to us perfectly natural for a person whose attention is thus suddenly focussed on an event or occurrence to see the part of the scene to which his attention is attracted, without taking in the whole picture. For example the master of the tanker ran out from the chart room upon hearing the four or five short blasts. He saw the carfloats which the tanker almost ran down; but did not notice the sand tow. We do not infer from this that the sand tow "was never in the picture," as found by the court below.

The Controversial Issues of Fact

In the discussion which follows we shall endeavor to find the correct answers to the following controversial questions: (1) what were the relative positions of the tanker on the one hand and the two tows on the other when the one-blast signal was given; (2) how close was the sand tow to the carfloats when the carfloats crossed the bow of the tanker; (3) what were the relative speeds of the tanker and the tows just before the "hard left, full ahead" order was given by the pilot; (4) what was the function of the two Meseck tugs, one to port and the other to starboard of the tanker as she steadied on the Range; and did any act or omission of the pilot or those aboard these tugs contribute to the grounding; (5) had the helmsman promptly obeyed the hard left order of the pilot would

the tanker nevertheless have grounded; (6) did the pilot change his course to the right after giving the danger signal and before he ordered "hard left, full ahead."

The Tugs and Tows

It is clear to us that the tugs and tows seriously obstructed the navigation of the tanker and that the negligent operation of both the tug "Metropolitan No. 2" and of the Railroad tug "Long Branch" contributed to the grounding of the tanker on Dimond Reef. We so find. But no fault is found against any of the sand scows or the carfloats nor against the tug "Metropolitan No. 3."

What made our task unduly difficult at the outset was not only the fact that the scene as portrayed in the opinion below is painted with a large brush, but also the confusion caused by a parade of witnesses, who had little or nothing to contribute to the case, and by a welter of inconsistencies and contradictions caused by the marking of charts, and the measuring of distances with dividers, and so on, by other witnesses who at times did not have the remotest idea of what they were doing. But a careful digesting of the entire record lends perspective; and the seeming fog and confusion are readily dissipated. We shall work our way back from the grounding.

While it is probable that the tanker bumped or scraped along the rocky surface of the reef before she fetched up, there is no doubt that she held fast at some part of the northerly tip of the reef, parallel with the Range and hence well south of the Range. We also find that the tanker was south of the Range when the "hard left, full ahead" order was given. We shall discuss this point in some detail later on. As we have already indicated, the record in its entirety literally compels a finding that the stem of the tanker missed the stern of the port carfloat by the narrowest of

margins. As this finding is of such critical importance, we shall briefly review the testimony and some of the exhibits marked by some of those who testified.

One of the most impressive witnesses was Robert J. Wilcox, the helmsman on the tanker. This young man frankly admitted that he gave the wheel two or three turns to the right although the order "hard left" had been repeated both by second officer Richard and by himself. He said he did this instinctively and without thinking, because he saw the carfloats practically dead ahead and he thought he would ram them. The fact is that the stem of the tanker had already cleared the stern of the port carfloat, and there is at least a possibility that the stranding would have been avoided had Wilcox done as he was told. But we credit his testimony that the carfloats were so close that he thought he would ram them if he obeyed the "hard left" order. We shall return to Wilcox later when discussing the question of whether or not we should find that the tanker was also to blame.

Ernest Kunlivan, the boatswain, was up in the forecastlehead to stand by the anchors in case of emergency and perhaps to make fast a line from one or both of the assisting tugs. He could not have been in a better position to see the distance between the stem of the tanker and the stern of the carfloats. He testified that the clearance was about 30 feet. Philip, the purser of the tanker, ran out of his cabin when he heard the danger signal, saw the carfloats off the tanker's starboard bow, thought there was going to be a collision and went back to his cabin when he saw the tanker was going to clear the carfloats.

There were two assisting tugs. The "William Meseck" had put the pilot aboard the tanker at Quarantine. McConnell, the mate of this tug, in charge in the absence of Rowohlt, had first gone to port of the tanker but was

directed by the pilot to move over to starboard, which he did. He saw the sand tow cross the bow of the tanker as the danger signal was blown and testified that the carfloats were "right around the stern" of the sand tow. Edward R. Hoffman, at the wheel of the tug "Hayward Meseck," on the port side of the tanker, testified that the carfloats cleared by 10 feet. Mullock, the master of the tanker, fixed the distance as 25 or 30 feet. Richard, the second officer, testified it was 20 or 25 feet. Rowohlt, the pilot, said he just cleared by about 20 feet. It is claimed that this is contradicted by his testimony at the Coast Guard hearing, a few days after the grounding, but we find no contradiction in view of the diagram (Exhibit 9) prepared by Rowohlt at the Coast Guard hearing. He may have misplaced the tows by not properly portraying the crossing but the proximity of the vessel and the tows is unmistakable.

Henry G. D. Hoffman operating the Governors Island Ferry "Lt. Col. Robert E. Shannon," which left the Battery at 12:15 P. M. and arrived at Governors Island at 12:21 P. M., testified that the two tows and the tanker "seemed to all blend together" and that the clearance at the crossing of the tanker's bow was 10 feet—"the floats just missed getting hit." Roland H. Whelan, quartermaster of the ferry "Ellis Island," which left Ellis Island at 12:15 P. M. and tied up in her slip at the Battery at 12:29 or 12:30 P. M., thought there would surely be a collision. He testified, it "looked very close to me, maybe 10, 20 feet, and I couldn't see how an accident could have been avoided." William G. Tuttle, at the wheel of the "Gold Star Mother," the Staten Island Ferry arriving at her slip at the Battery 12:30 or 12:31 P. M., gives the clearance as 20 to 30 feet, "they were all in very close quarters," with the carfloats

about 100 feet behind the sand tow. We find no trace of animus in the testimony of these witnesses.

It is perhaps understandable that Hutton and Molloy operating the Metropolitan No. 2 tug, with the sand scows, and the "Long Branch," with her carfloats, respectively, should place their tugs and tows at so great a distance from the tanker as completely to negative any interference with the navigation of the tanker. Hutton was completely discredited; and Molloy's testimony at the Coast Guard hearing that his tow cleared the tanker by only 70 feet would seem an insurmountable obstacle to the acceptance of his trial estimate of 200 or 175 or 150 feet in view of the overwhelming testimony to the contrary.

Albert H. Reichert, at the wheel of the tug "Metropolitan No. 3," following some little distance behind the two tows with orders to take off one of "Metropolitan No. 2's" sand scows somewhere in the neighborhood of the Battery, adds little to appellees' version of the stranding. His testimony, when considered in the light of his statement (Exhibit YY), leaves us with the impression that he saw little if anything of the events preceding the actual grounding of the tanker. In any event, he says that the sand tow and the carfloats "were up and out in the North River when the ship was coming up on the range," that the tanker grounded when he was abreast of her and that the two tows "were in the North River at the time." It requires little argument to demonstrate the unreliability of this testimony. Rodden of the Staten Island Ferry "Cornelius Kolf," in the offshore pilothouse in No. 5 Slip South Ferry, is another broken reed. His testimony is a mass of confusion, as is indicated by his insistence that "I saw the Meseck tug blowing the alarm," and that he actually saw the steam from her smokestack as she blew the alarm. Bielinski, the first deckhand or mate of the

"Long Branch" gives the nearest point of the tanker to the carfloats at the time of passing as 400 to 450 feet. There is no trace of partisanship in his testimony, and no outbursts or profanity as in the case of Hutton, but he is clearly mistaken on many points, and we think it may have been unwise to have him present during the entire trial of four months, except for a week or so when he was ill, listening to the testimony of the other witnesses. He was called near the very end of the trial. Bernard Sheridan was sitting on a settee behind Tuttle on the "Gold Star Mother." If it was thought that he would contradict Tuttle's testimony in some vital particulars, his testimony must have been disappointing. He added precisely nothing to the case.

The owners of the tugs and tows lean far too heavily upon the witness William M. McGuire, who described what he said he saw after hearing the alarm signal as he sat at his desk in his office on the top floor of the Whitehall Ferry Building. If his attention was first attracted by the four or five short blasts, as he said, he could not possibly have seen the tanker as she steadied on the Range and he locates the two tows so far away from the tanker as to make his testimony of little value. (See dots placed by McGuire on Exhibit 78.) He characterizes the grounding as "the strangest thing I ever saw," and all the probabilities of the situation militate strongly against a version that describes the tanker, in charge of an experienced pilot, slowing down, then starting up, taking a sudden "sheer" to starboard and fetching up in Dimond Reef, all on a clear day, without any other vessel anywhere near her, and after blowing a meaningless danger signal. No explanation worthy of the name is given for his failure to mention to the representative of appellants' counsel, on the various occasions of their talks together, that he claimed to have seen what he later testified to; nor is it

clear to us why he read parts of the testimony given at the Coast Guard hearing and over 1000 pages of the trial transcript in preparation for his appearance on the witness stand.

Thus we have two long, unwieldy tows, one immediately behind the other and in a position to pass to port of the first tow, the intervening distance between the two being 100 feet or so, crossing the bow of the tanker on a westerly or northwesterly course, at a point where the tanker is already south of the Range. How did the tows get there?

Without discussing the testimony in detail, it will suffice to say that there is abundant evidence to support a finding that, as the tanker came up the bay and past Governors Island she swung on to the Range at about which time the pilot gave the one-blast signal. There was no traffic in sight up the East River except the two tugs and tows. We find the location of the tanker and the two tows was such as to make this signal for a port-to-port passage quite in order, and that he was, as he testified, signalling to the two tows. It was, at the time the single blast signal was given, a meeting head and head. We cannot agree that, as found below, this signal blast was not addressed "to any particular vessel but was only to warn all traffic in the East River of the Rincon Hills' approach." No such signal is provided for in the Navigation Rules for Harbors, Rivers, and Inland Waters, 33 U. S. C. § 203, or in the Pilot Rules for Inland Waters, 33 C. F. R. §§ 80.01-80.36; nor was the one-blast signal here given with any such intent. Unnecessary signals are forbidden, Section 80.35; the proper response if the tugs contemplated a port-to-port passing was a single blast, Section 80.03; if there was some misunderstanding on the part of the tugs, or if they had appreciated the difficulties which necessarily would arise if they turned and exposed the entire string of sand tows and carfloats broadside to the ebb tide, they should

have sounded four or more short blasts, the danger signal, Section 80.1. See also La Boyteaux, *The Rules of the Road at Sea* (1920) 181, 185.

Also, it has been aptly written:

> But I must never fail to remember that in giving forth these "blasts," I must only convey to my opponents the course I am about to follow in accordance with the Steering and Sailing Rules. It must always be present to my mind that if I depart from the Rules, and make signals by "blasts," which may indicate a course or manoeuvre not authorized by the Rules, I and my owners and my ship will probably be condemned in costs * * *. Gray, *Rule of the Road* (4th ed. 1884) 32.

Moreover, the tugs and tows and the tanker were clearly in such relative positions that passing signals were in order; but the tugs made no response to the signal from the tanker, and, to make matters worse, they pursued, even after the danger signal, a course which made disaster almost inevitable.

The pilot waited about 30 seconds for a response from the tows, and then, as neither tug made any response whatever, he blew four or five short blasts—the danger signal. What he meant by this is too obvious for comment. He thought a dangerous situation was developing and he was quite right. But neither of the tugs made any response whatever; and there is undisputed proof in the very testimony of those operating the tugs that, with a reserve power always available for emergencies, no direction was given to the engineer of either craft to increase the speed of his engines. Moreover, there was a strong westerly wind of about 23 miles an hour that could not have failed to slow up the progress of the tows to an appreciable extent.

We hold that passing and danger signals are to be taken to mean precisely what is stated in the Pilot Rules, *supra*.

They have a clear and settled meaning as above stated, and the master who fails to make the appropriate and required response is guilty of a statutory fault and must take the consequences. It may well be that passing signals are frequently unnecessary, but such appears not to be the case here. The disregard of the danger signal is particularly blameworthy.

We are asked by appellants to rule that the approximately 325 yards of deep water from the 23-26-25-21 foot line off the lower Manhattan ferry slips and piers at the Battery to the westerly side of the Range off Governors Island is a "Narrow Channel," within the meaning of the Rule of Navigation, 33 U. S. C. Section 210, which requires vessels and craft when proceeding in such channel to "keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." Appellees insist that it is well settled law in this Circuit that this body of water is not a Narrow Channel, citing *The Wrestler*, 2 Cir., 232 Fed. 448; *The Bern*, 2 Cir., 74 F. 2d 235; *City of New York* v. *American Export Lines, Inc.*, 2 Cir., 131 F. 2d 902. See also Griffin, *The American Law of Collision* (1949), § 36 n. 14 at p. 94. We are inclined to agree with this, especially in view of the extent and conformation of the harbor area involved and the cross or east and westbound traffic, although these cases do not deal with the precise body of water here involved. But we need not give that point the consideration here that it perhaps deserves, as we hold the tows at fault for being where they had no business to be at a time when a deep draft vessel was steaming up the Range. Even if not a statutory fault this is plain, ordinary negligence. See *The Wrestler, supra; The Concho*, S. D. N. Y., 58 Fed. 811, aff'd 2 Cir., 63 Fed. 1023. We hold that when large steamers or tankers or other deep draft vessels are on the Range or steadying on a course past Dimond Reef up the East River, tugs and tows and other unwieldly craft must keep away

from the waters near the Range. On an ebb tide the slightest interference with the navigation of deep draft vessels is apt to end in disaster, as there is practically no room in which to maneuver vessels several hundred feet in length and the current is bearing in a southwesterly direction right over the face of the reef. The danger to the entire waterfront as well as to other ships in the vicinity is also manifest, as oil or gasoline bubbling up to the surface from fractures of the cargo tanks caused by grounding on Dimond Reef or by collision, may at once or later be ignited.

Thus, even in the absence of any lack of response to signals, and irrespective of how they got there, the tows were at fault for not keeping away from the immediate vicinity of the Range, where they interfered with the navigation of the tanker.

The record demonstrates in the clearest possible manner, however, just how the tows found themselves on the Range. It was actually dead low water at the Battery at 12:18 P. M., eight minutes later than the predicted time. The current continued to run out over Dimond Reef on the ebb for about 1½ hours after low water at the Battery. We accept the data prepared by the Currents and Oceanography Branch of the Division of Tides and Currents of the U. S. Coast & Geodetic Survey (Exhibit 100) and reject conflicting data prepared by others. According to the testimony of Don C. Piper, Assistant Chief, the "current comes out of lower East River and is carried in a southwesterly direction, crosses Dimond Reef and on to Governors Island where it is turned to the westward." This witness gives the velocity of the current over Dimond Reef at the stage of the tide already indicated as one and a half knots, and the velocity was greater further up the river as indicated in Exhibit 100.

It so happened that both Hutton and Molloy, in charge of the two tugs, miscalculated the current cycle. Each was under the misapprehension that at low water at the Bat-

tery the current was slack or practically so. It is hard to believe that two such old hands at towing in New York Harbor would make such an error but their testimony to that effect is unequivocal and convincing. Each insists he made no allowance for the current, which is another way of saying that he operated his tug without taking into account that he had underneath him a current carrying him down in the direction of the Range and Dimond Reef at the rate of 1½ knots an hour.

As the incidents already described all took place in the ten or fifteen minutes preceding 12:30 P. M. on the day in question, it is highly probable that both Hutton and Molloy thought they barely had time to make the Battery with the very end of the ebb current, a matter of vital consequence to them. This would explain their remaining in midstream longer than usual, as there was less current near the piers. In any event, in a statement made on December 13, 1951, very shortly after the grounding, by Hutton to the attorney retained to represent Metropolitan, and reduced to writing and signed, Hutton says that after passing below the Brooklyn Bridge "the tow was favoring the middle of the river." He says that he saw the tanker "when the tow was about off Pier 9," and that "when approaching or in the vicinity of Pier 5 we began to pull in toward South Ferry so as to be in a position to round the Battery." Every effort to get away from this at the trial was unavailing. Finally, Hutton confirmed the statement, saying "the statement is true," and "it must be right, I signed it." Under these circumstances, and in view of the position of the vessels when they barely missed collision, we have no other alternative than to hold that the finding below to the effect that Hutton began to pull in when off Pier 8 rather than when off Pier 5 is clearly erroneous.

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But, if Hutton's sand tow was favoring the middle of the river until he reached Pier 5, this fixes the position of Molloy and the carfloats following close behind but slightly to port of the sand tow. This is something Bielinski, standing in the pilothouse of the "Long Branch" alongside of Molloy as a sort of observer or lookout, would be likely to notice. And Bielinski's testimony on the subject is explicit. He testified that at Pier 8 the sand tow was ahead "of the starboard carfloat," "a little to our right," with the stern of the last sand scow just ahead "of the center of the starboard carfloat." Accordingly, the carfloats were further out in the river than the sand tow, and, as Hutton waited until he reached Pier 5 to turn in, the carfloats were still to his port. And this relative position of the two tows continued until after they passed the tanker, although they came closer together with each passing moment. Bielinski said the two tows were 200 or 250 feet apart when off Piers 8 and 9, that the distance was slowly closing; and we have already found that they were about 100 feet apart as they crossed the tanker's bow.

On the basis of these facts what happened to the two tows in the few minutes following Hutton's decision to pull in toward South Ferry at Pier 5 is merely an operation of the laws of physics. As the two tugs turned to the West the tows caught the force of the ebb current broadside and they swung out into the river, each now headed West or substantially so, but they were making about as much progress down toward the Range as they were making ahead. Thus strung out the two tows covered a distance of almost 900 feet, including the 100 feet between the two tows, through which 100 feet the tanker could not have passed, and they completely blocked off the tanker. The probability is that Hutton and Molloy were looking toward their respective destinations, completely oblivious

of the danger to the tanker, until they suddenly saw her close aboard.

In view of the foregoing we do not find it necessary to pass upon the question presented by the medical proof relative to Molloy's competence to manage the "Long Branch." We shall return to this subject and discuss it briefly, together with the matter of Charts and Tide and Current Tables, when we come to the subject of limitation.

The Tanker

We find it more difficult to determine whether or not there was fault on the part of the tanker. This involves a consideration of her speed, the various directions given by the pilot after the one-blast signal, whether the assisting tugs should have been ordered to make fast before they started to come alongside and found it impossible to do so, and the circumstances attending the disobedience by the helmsman of the "hard left" order. We have concluded that the tugs "Metropolitan No. 2" and "Long Branch" were solely to blame.

We accept the testimony of Rowohlt, the pilot. There was considerable credible corroborative proof, but we find it not necessary to describe it in detail. Most of the alleged discrepancies between his extensive testimony at the trial and his brief interrogation at the Coast Guard hearing disappear on close analysis. We do not read his testimony at the Coast Guard hearing as stating that there was no interference with his navigation by the two tows. On the contrary, he answered "yes" to the following question: "You said that if the tugs and tows had not been where they were, you would have taken the 'Rincon Hills' on a turn into the East River at about a point where the ship would have been opposite South Ferry, is that correct?" There is more to the same effect. When he testified that

his "hard left" order was not to avoid a grounding or to avoid the tows, we interpret this as meaning that he thought he was a safe distance from the reef and that the tows had already crossed his bow. When he gave it, he believed the "hard left, full ahead" order would take him safely up the East River. But, by way of hindsight, he testified at the trial that, even if the "hard left" order had been executed the tanker would have grounded nevertheless. While at the Coast Guard hearing he does not specifically say that he gave the right wheel order which brought the tanker south of the Range, this is because no questions were asked about his orders to the helmsman after the tanker had steadied on the Range; and he did testify, "We were running parallel with the range and the ship was about half the distance south of the range." He explicitly stated at the Coast Guard hearing that when he gave the one-blast signal the position of the vessel and the tows was one of meeting head and head. Moreover, he testified that both the single blast and the danger signal were addressed to and intended for the tows, and this entire testimony at the Coast Guard hearing must be read in the light of the sketch he then drew, Exhibit 9 on this trial, to which reference has already been made.

The substance of his recital at the trial of the tanker's maneuvers prior to the "hard left, full ahead" order was: after the single blast he steadied on the Range in a matter of seconds at half speed; that 30 seconds after the single blast he sounded the alarm, ordered the engines stopped and gave the right wheel order which was executed, bringing the tanker slightly south of the Range; that the two tows were a good ship's length and a half away when he sounded the alarm; that two minutes elapsed between the sounding of the alarm and the grounding. He said he could not bear to port because of the presence of the sand tow

and that he could not reverse his engines as this would turn the tanker to starboard and on the reef. The Bridge Bell Book, which we consider the most important piece of documentary evidence in the case, gives the "full ahead" order at 12:26½ P. M. and at 12:27 P. M. contains the entry "stop struck bottom (Diamond Shoal)." We say this despite the discrepancies between these entries and those made by the oiler in the Engine Bell Book. Moreover, the little curved arrow leading to the words "(Diamond Shoal)" on the preceding line seems to us to be a natural way of making the record in this small note-book. In view of the other entries in the book there seems to us to be no reason to doubt the explanation that the use of the arrow and the previous line was thought preferable to placing "(Diamond Shoal)" on the line underneath. We find nothing suspicious about this entry or the entries in the rough log of the vessel. Accordingly, we find, on the basis of this and other proof, not only that the refusal to find that the right wheel order was given and executed was clearly erroneous, but in addition that the tanker was continuing to swing slightly to starboard when the "hard left" order was given, that she was still on a right swing when she hit the reef, and that the interval of time between the turning of the wheel to the right rather than to the left as ordered, and the correction of this mistake by the helmsman, was no more than 15 or 20 seconds at most. In response to the order to correct his mistake he was turning the wheel to the left as she struck. As we are favorably impressed by the competency of the experts who testified on the tanker's behalf and the accuracy of their opinions on the subject to the lateral movement of the vessel, we are convinced that in all probability the tanker could not have cleared the reef if the "hard left" order had been properly and promptly executed. See Knight, *Modern Seamanship*

(11th ed. 1948) 294. But we cannot be certain of this and hesitate to make a finding to that effect because there is no way of knowing with any degree of accuracy what the precise position of the tanker was with relation to the reef when the order was given.

The speed of the tanker was approximately 7½ knots, even after the engines were stopped. Under normal conditions this would not be excessive. We have found it impossible to estimate the speed of the tugs and tows. Perhaps the sand tow was making 3 knots or so and the carfloats more. We estimate all these speeds through the water rather than over the ground. The question then is: from the moment it was apparent that a dangerous situation was developing ahead, did the pilot take every reasonable and available means of meeting it. When the single blast signal was given the intended course of the two tows could not have been known by Rowohlt. It is still difficult to understand Molloy's persistence in following close behind the sand scows and to port of the sand scows. With the power at his disposal, and the fairly light load as compared with a full load of 17 cars, he could easily have passed the sand tow to starboard and got out of the tanker's way. It is not unlikely that his mental operations were affected to some extent by his chronic hypertension and by the sedatives he was taking on his doctor's advice. For all Rowohlt knew the carfloats were headed up Buttermilk Channel. In any event, it was not until he got no response from either tug to his single blast signal that Rowohlt knew or could have known that a dangerous situation was developing. We can only conclude that the failure to respond to the single blast signal and the manner in which the two tows proceded thereafter was due to negligence and inattention on the part of Hutton and Molloy, and their testimony gives ample support of this conclusion.

Accordingly, we must test the question of fault on the part of the tanker by ascertaining what, if anything, Rowohlt could have done to avoid running down the car-floats or coming perilously close to the reef after he sounded the danger signal. He did stop his engines. Could he have safely reversed his engines? We have concluded, on the basis of the expert opinion testified to, and other supporting proof, that this maneuver would have brought the tanker on the reef. In this connection it must be borne in mind that a current of [illegible] and one-half knots was flowing in the direction of and [illegible] Dimond Reef. There was little or no possibility that reversing the engines could have had any effect other than to increase the danger. How about the assisting tugs? Rowohlt had already ordered one of them from the port to the starboard side of the tanker. Surely there was no occasion to have more than two assisting tugs and it seems quite reasonable to place one of them to port and the other to starboard. The dangerous situation, due in no small part to the failure of the two tows to respond to the single blast signal, developed only when it became apparent that the two tows were oblivious to or unmindful of the way they were obstructing the progress of the tanker on the Range; and this, as it later turned out, was due to the miscalculation by both Hutton and Molloy of the force, velocity and direction of the current. At the time the single blast signal was given McConnell was in the very act of bringing the "William Meseck" in close to make fast to the tanker on or near her starboard bow. But this became impossible as Rowohlt gave his right wheel order, and the swing to starboard which brought the tanker south of the Range forced McConnell to drop back. We may add, parenthetically, that the only fair inference to be drawn from McConnell's testimony, taken in its entirety, is that the right swing he was describing

was the result of the right wheel order given after the sounding of the danger signal, and not to any action of the tanker due to the mistake of the helmsman later on. Edward R. Hoffman testified that he was in charge of the tug "Hayward Meseck" to port of the tanker, and that he was prevented from making fast to the tanker's port bow by the proximity of the sand tow. The sand scows came so near his tug that he dropped in close alongside the port side of the tanker, and he was forced to stay there as the carfloats immediately followed the sand scows. This brief review of the testimony we think disposes of the claim that proper use was not made of the assisting tugs.

Accordingly, this phase of the case comes down to the act of the helmsman in disobeying the "hard left" order of the pilot. Ordinarily, such disobedience, if it contributed to a collision or grounding, would constitute a fault chargeable to the vessel. It is the most serious charge made against the tanker in this case, and the one that has caused us the most difficulty. Taking all the attendant circumstances into consideration, however, we have concluded that an *in extremis* situation existed and the natural and instinctive reaction of the helmsman, faced as he thought with the certainty of ramming the carfloats, is excusable. It will be recalled that the "hard left" order was repeated both by the second officer Richard and by the helmsman himself. We find the tanker free from fault.

Limitation of Liability

The Railroad, within six months after notice of claim, filed petitions for exoneration from or limitation of liability as owner of the "Long Branch" and of each of the two carfloats. All procedural requirements were concededly complied with; and we are presented with several interest-

ing questions of law, none of which was passed upon by the court below, as the tanker was found to be solely at fault and the tug and the carfloats were exonerated.

Appellants, without citing any authority, claim that the "Long Branch" and the carfloats were not engaged in any maritime undertaking but were acting merely as a ferry in an exclusively railroad operation, and they would have us hold that the legislation embodied in 46 U. S. C. Sections 183 and 185 was not intended by the Congress to be applicable to railroad lighterage in New York Harbor, for the reason, among others, that the inclusion of vessels engaged in railroad car lighterage would not contribute in any way to putting American shipping upon an equality with that of other maritime nations. And we are referred to clauses used in Uniform Bills of Lading as in some way supporting this view. But we think it too clear to require extended discussion that the tug and tow were vessels within the meaning of the words "any vessel" in the Limitation of Liability Act. The operation here involved was maritime; those aboard each of these vessels doubtless came under the protection of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Section 901 *et seq.*; and the fact that the carfloats were designed and built for the specific purpose of transferring railroad freight cars from one railroad terminal to another in and about New York Harbor does not make the operation any the less maritime in character.

Appellants also contend that neither the Railroad nor Metropolitan is entitled to limit its liability because both the tug "Long Branch" and the tug "Metropolitan No. 2" were unseaworthy with the knowledge and privity of their owners. With respect to both tugs it is claimed by appellants that no copies of the Charts, Tide Tables and Current Tables issued by the United States Coast and Geodetic Survey were provided to the tugs to be kept on board always

available for use. But both Hutton and Molloy were obviously familiar with the waters covered by the Charts of New York Harbor. As to the Railroad the evidence is that Charts as well as Current Tables were available and could have been obtained on demand at the Dispatcher's Office at any time by Molloy or other tug captains in the employ of the Railroad, if they were to operate in any part of the Harbor concerning which they felt further information should be had or if they had any other special need of them. The evidence concerning Metropolitan is less clear but it is probable that Charts were available or actually on "Metropolitan No. 2" but the Current Tables were not. The "Long Branch" and the "Metropolitan No. 2" each had on board a Commercial Tide Calendar giving high and low water at Sandy Hook, the Battery and Hell Gate. Taking the evidence as a whole we think both the Railroad and Metropolitan acted reasonably in committing the navigation of their tugs to these two men of many years experience towing in the very waters involved in this case without making further provision for either Charts or Current Tables. Many of the witnesses testified that it was not customary to have them on board harbor tugs. We are still at a loss to understand how Hutton and Molloy miscalculated the current cycle; but the mere fact that they did so does not convince us that the failure to make further provision for Charts and Current Tables aboard these tugs was a wilful fault by the owners such as to deprive them of the benefits of the Limitation of Liability Act.

As to Molloy appellants most earnestly press the claim that there was wilful fault on the part of the Railroad in permitting him to continue as Master of the "Long Branch," despite knowledge of his chronic high blood pressure. We think, however, that it is a sufficient answer to say that a competent medical examiner, acting on behalf of the Rail-

road, passed him subject to reexamination as fit for duty. It may well be that there was inexcusable delay in producing some of the records and others were never produced; but what we considered to be the whole story came out in the end and we find nothing to impugn the good faith of the medical examiner.

Appellants also raise an interesting and important question not previously passed upon by us, so far as we are aware, and on which there are conflicting decisions in the District Courts for the Eastern and Southern Districts of New York and elsewhere.[1] It will be recalled that Metropolitan filed no separate or other petition for limitation of liability but, long after the six months period after notice of claim as provided in 46 U. S. C. Section 185, Metropolitan alleged the Limitation Act, 46 U. S. C. Section 183(a), as a partial defense to the libel. Appellants assert that there can be no limitation of liability unless a proper claim therefor is made, either by the filing of a petition for limitation or by way of defense to a libel or other court proceeding within six months after notice of claim. In other words, appellants would have us hold that every claim of limitation of liability asserted under 46 U. S. C. Section 183(a) is subject to the six months requirement of 46 U. S. C. Section 185.[2]

The law is well settled that a petition to limit liability pursuant to 46 U. S. C. Section 185 is valid and effective

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[1]Six months time limit applicable: *Cantwell* v. *Meade*, E. D. N. Y., 120 F. Supp. 406; *The Irving*, S. D. N. Y., 33 F. Supp. 59; cf. *The Joseph O'Donnell*, E. D. N. Y., 37 F. Supp. 120.

Six months time limit not applicable: *De Cruz* v. *Hiering*, D. N. J., 69 F. Supp. 397; *Cantey* v. *McLain Line, Inc.*, S. D. N. Y., 40 F. Supp. 887; *Coryell* v. *Pilkington*, S. D. Fla., 39 F. Supp. 142; *Carpenter* v. *Mary R. Mullins, Inc.*, D. Mass., 33 F. Supp. 10.

[2]Section 183(a):

The liability of the owner of any vessel * * * for any loss, damage, or injury by collision * * * done, occasioned, or incurred,

only if it is filed within six months after the shipowner receives written notice of claim. *The Fred Smartley, Jr.*, 4 Cir., 108 F. 2d 603; *Standard Wholesale Phosphate & Acid Works, Inc.* v. *Travelers Ins. Co.*, 4 Cir., 107 F. 2d 373; *The Irving*, S. D. N. Y., 28 F. Supp. 585, aff'd 2 Cir., 107 F. 2d 1011; *The Grasselli Chemical Co. No. 4*, S. D. N. Y., 20 F. Supp. 394.

There is, however, a separate and distinct procedure by which a shipowner may limit his liability in accordance with 46 U. S. C. Section 183(a). A shipowner may institute a separate proceeding by the filing of a petition for limitation or he may plead the limitation statute, 46 U. S. C. Section 183(a), in his answer as a defense to suit against him. See 3 *Benedict on Admiralty* (6th ed. 1940) Section 508.

The Third Circuit, in a well-reasoned opinion by Judge Goodrich, has held that the six-month period does not govern a plea of limitation by way of answer. *The Chickie*, 3 Cir., 141 F. 2d 80, 84-85. In reaching its decision in *The Chickie* the Court reviewed the historical development of the two different procedures available to shipowners to limit their liability. We are in accord with the analysis developed in Judge Goodrich's opinion and we hold that a plea of limitation by way of answer is not subject to the six-month time limit in Section 185. It is to be noted, however, that all those interested, including the "Rincon Hills" as bailee of the cargo, are parties to the consolidated proceeding now before us in which the respective claims of limitation are asserted.

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without the privity or knowledge of such owner or owners, shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Section 185:

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter * * *

The first statute authorizing the limitation of liability, the forerunner of Section 183, was enacted in 1851, 9 Stat. 635. In 1872 the Supreme Court promulgated admiralty rules of procedure which permitted a shipowner to petition for limitation of liability. Shortly thereafter the Congress enacted the substance of these rules into law. In commenting on the purpose of the rules, the Supreme Court said they "were adopted for the purpose of formulating a proceeding that would give full protection to the shipowners in * * * a case" where there were "various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo." "They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt. They were not intended to prevent a defence by way of answer to a libel, or plea to an action, if the ship-owners should deem such a mode of pleading adequate to their protection." *The Scotland*, 105 U. S. 24, 33-34. It is unnecessary to comment on the variety of situations that may arise, in some of which concursus is highly desirable if not indispensable and in others not.

In practice it developed that the proceeding by way of petition for limitation of liability was often a source of delay and circuity of action, because shipowners did not institute this independent proceeding until after the question of liability had been litigated and determined against them. To alleviate the abuses inherent in this situation, the Congress, on June 5, 1936, amended Section 185 to require that a petition for limitation must be filed within six months of notice of claim.

Section 185, as amended, does not refer to Section 183 (a), and no reason has been advanced by appellants for making the right to limitation as provided in Section 183(a) subject to the six months time bar. Indeed, the Congress amended both Section 183(a) and Section 185

simultaneously in 1936 without specifying any time limit in Section 183(a). Moreover, the abuses which resulted under Section 185 prior to its amendment are not encountered when limitation is pleaded by way of answer, because the libelant, by filing its libel, controls the time within which the remedy must be invoked. Therefore, in accord with *The Chickie, supra,* we hold that the Metropolitan plea of limitation in its answer was not barred by the six months time limit of 46 U. S. C. Section 185.

Appellants, pursuing what seems to be another phase of the point just above discussed, assert that Metropolitan "posted no bond or stipulation." If all that is meant by this is that the requirements of Section 185, as to time and the posting of a bond or stipulation, are to be read into Section 183, it will suffice to say that we hold otherwise. On the other hand, when limitation of liability is asserted by way of defense in the answer there are interlocutory remedies open to a libelant to prevent loss or depreciation of the vessel by requiring surrender or the posting of security. These are procedural matters which do not appear to affect the substantive rights of the parties and they are normally litigated before or at least during trial. As the record discloses that certain proposed stipulations were served by Metropolitan on the office of libelants' proctors but were apparently mislaid, and there are references to attempts to agree upon a form of stipulation similar to the one entered into with the Railroad, we have concluded that, in this unclear state of the record, we shall and do leave this point open, to be decided by the District Court on the remand.

We next consider whether the Railroad and Metropolitan limitation funds must include the value of all craft in each of the two flotillas, as is urged by appellants, or whether the surrender of the tugs "Long Branch" and "Metropolitan No. 2," and not the scows or carfloats, is

sufficient for the purpose of limiting liability, as contended by the respective appellees. If the question were an open one we would be disposed to include the whole flotilla if we could, especially in the case of the carfloats, but we must take the law as we find it, and the question is no longer open. In *Liverpool, Brazil & River Plate Steam Navigation Co.* v. *Brooklyn Eastern District Terminal,* 251 U. S. 48, libelant's steamship was damaged while it was moored at a pier in Brooklyn when a carfloat lashed to the port side of respondent's tug collided with it. The tug was proceeding up the East River with the carfloat on its port and a disabled tug on its starboard side. All three vessels were owned by respondent. The sole question before the Supreme Court was "whether the value of the whole flotilla should not have been included in the (limitation) decree." The Court held that only the value of the tug was required by law to be included, because the carfloat, although it was the vessel which collided with the steamship, was a "passive instrument in the hands of" the tug, and "for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it." Previously there had been disagreement among the Circuits regarding this question. See *The Begona II,* D. Md., 259 Fed. 919. But the Supreme Court, in an opinion by Justice Holmes, in the *Liverpool* case agreed with the Second Circuit view that the tug and tow did not become one vessel and placed the question at rest on the theory that the words "any vessel" in the Limited Liability Act meant the offending vessel and not others attached to it, even though all were in common ownership and engaged in a common venture. We are not at liberty to disregard this binding precedent simply because a contrary view may seem to reach a conclusion more in keeping with the realities of this particular case.

As we have previously noted, it is clear that the carfloats and sand scows in tow of the tugs "Long Branch" and "Metropolitan No. 2" were merely passive instruments of navigation. They had no motive power of their own. Accordingly, only the value of the two tugs need be included in the limitation fund.

Those cases cited by appellants, in support of their position that the passive instrument as well must be surrendered, involved a breach of contract where the libelant had entered into a contractual agreement with the respondent, either for the transportation of himself and his goods, *The Big Chief*, E. D. Mo., 75 F. Supp. 496; see also, *The Columbia*, 9 Cir., 73 Fed. 226, or of employment, *Standard Dredging Co.* v. *Kristiansen*, 2 Cir., 67 F. 2d 548. As no such contractual relationship existed between any of libelants and either the Railroad or Metropolitan, the cases cited by appellants are not in point. This distinction is noted in *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 332, a case involving exoneration under the Harter Act, as follows:

> This court held (in Liverpool) that it was necessary to surrender only the active tug, saying "that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it." But this is far from saying that the entire flotilla might not be regarded as one vessel for the purposes of the undertaking in which the common owner was engaged at the time of the collision. The distinction seems plain. There the libel was for an injury to a ship in no way related to the flotilla. It was a pure tort—no contractual obligations were involved; and the simple inquiry was, What constituted the "offending vessel"? Here we must ask, What constituted the vessel by which the

contract of transportation was to be effected? a very different question.

See also, *In re O'Donnell*, 2 Cir., 26 F. 2d 334.

Moreover, if fault is attributable to more than one of the vessels engaged in a common venture or enterprise, each with motive power of its own, then each such vessel must be surrendered. *United States* v. *The Australia Star*, 2 Cir., 172 F. 2d 472. Likewise, if a vessel in tow of a negligent tug is found at fault, the value of both vessels must be included in the limitation fund. *Petition of Lake Tankers Corp.*, S. D. N. Y., 1955 A. M. C. 55; *The Bowling Green*, E. D. N. Y., 11 F. Supp. 109, aff'd 81 F. 2d 1017. But, in the case before us, as in *Liverpool*, no fault whatever is attributable to the sand scows or to the carfloats. It is true that they made the flotillas more cumbersome, but it does not follow that they were at fault, and we hold they were not.

The decree below is reversed and the consolidated cases are remanded for further proceedings not inconsistent with this opinion.

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of July, one thousand nine hundred and fifty-eight.

Present:

HON. HAROLD R. MEDINA
HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
Circuit Judges

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the S/T "RINCON HILLS", and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Libelants-Appellants,

—against—

The steamtug "LONG BRANCH", the RAILWAY CARFLOATS No. 61 and 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BJAX", the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents-Appellees.

Index No. 24439

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed and action remanded for further proceedings not inconsistent with the opinion of this court; with costs to the appellants.

A. DANIEL FUSARO
Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of July, one thousand nine-hundred and fifty-eight.

Present:

HON. HAROLD R. MEDINA
HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
Circuit Judges

In the Matter of the Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR OF NJ No. 61, for exoneration from or limitation of liability.	Index No. 24442

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court

be and it hereby is reversed and action remanded for further proceedings not inconsistent with the opinion of this court: with costs to the appellants.

A. DANIEL FUSARO
Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of July, one thousand nine hundred and fifty-eight.

Present:

HON. HAROLD R. MEDINA
HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
Circuit Judges

In the Matter of the Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR OF NJ No. 56, for exoneration from or limitation of liability.	Index No. 24441

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court

be and it hereby is reversed and action remanded for further proceedings not inconsistent with the opinion of this court; with costs to the appellants.

A. DANIEL FUSARO
Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of July, one thousand nine hundred and fifty-eight.

Present:

HON. HAROLD R. MEDINA
HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
Circuit Judges

In the Matter of the Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the Steamtug "LONG BRANCH", for exoneration from or limitation of liability.	Index No. 24440

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court

be and it hereby is reversed and action remanded for further proceedings not inconsistent with the opinion of this court; with costs to the appellants.

A. DANIEL FUSARO
Clerk

APPENDIX C

AMERICAN MARITIME CASES

PUBLISHED UNDER THE AUSPICES OF

THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

AND

THE ASSOCIATION OF AVERAGE ADJUSTERS OF THE UNITED STATES

PUBLICATION COMMENCED IN 1923

VOLUME XXXVI SEPTEMBER, 1958 No. 8

PENNSYLVANIA (SECOND RE-HEARING).

STATES STEAMSHIP COMPANY, *Appellant*,

vs.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY AND THE DOMINION OF CANADA, *Appellees*.

(FIVE CASES).

United States Court of Appeals, Ninth Circuit,
August 20, 1958.

No. 15,131.

Before: STEPHENS, DENMAN and POPE, Ct. JJ.

[1775]

* * *

LOFTOS TATUM and WOOD, MATTHIESSEN, WOOD & TATUM; BOGLE, BOGLE & GATES, STANLEY B. LONG, C. CALVERT KNUDSEN (ERSKINE B. WOOD, Advocate), *Proctors for Appellant, States Steamship Co.*

KEITH R. FERGUSON (Advocate), Sp. Asst. to Atty. Gen., GEORGE COCHRAN DOUB, Asst. Atty. Gen., C. E. LUCKEY, U. S. Atty., LEAVENWORTH COLBY, Ch., Admiralty & Shipping Section, Dept. of Justice (GRAYDON S. STARING, of counsel), *for Appellee, United States of America.*

KOERNER, YOUNG, MCCOLLOCH & DEZENDORF, SUMMERS, BUCEY & HOWARD, CHARLES B. HOWARD (JOHN GORDON GEARIN and GEORGE B. CAMPBELL, Advocates), *Proctors for Appellees, Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and the Dominion of Canada.*

On Petition of Appellee States Steamship Company for re-hearing on Limitation. Petition denied.

PER CURIAM:

On May 31, 1957, this court handed down an opinion in this case (1957 A. M. C. 1181) which affirmed the decision of the trial court rejecting the claim of appellant States Steamship Company for exoneration from liability [1776]
for loss resulting from the sinking of the Steamship, *Pennsylvania,* and granting its claim for limitation of liability. Thereafter all parties filed petitions for rehearing. Upon consideration of those petitions the court withdrew its former decision of May 31, 1957, and on November 15, 1957, substituted a new opinion (1957 A. M. C. 2277) which upheld the appeals of the appellant insurance companies, the United States, and the Dominion of Canada, from the decree limiting liability of States Steamship Company. Thereafter States Steamship Company filed a further petition for rehearing and upon invitation of the court, the insurance companies, the United States and the Dominion of Canada filed briefs in answer thereto, to which the Steamship Company has filed a reply.

Our further study of the points raised by this petition for rehearing convinces us that whether it be our fault, or otherwise, our decision of November 15, 1957, has been misunderstood, and we now make this further effort to clarify the basis for that decision.

Our opinion stems from the findings of the district court. We take those findings and then inquire, in view of the whole record, what those findings require. They are (1956 A. M. C. p. 1811):

1. "* * * the sole and proximate cause of the sinking of the *Pennsylvania* being her own unseaworthiness." (Finding III.)

2. "* * * the contributory factors responsible for the sinking of the Steamship *Pennsylvania* are found in the radiograms sent from the vessel immediately prior to her sinking, stating that the vessel sustained a crack down the port side between frames 93 and 94; that the crack started in the sheer strake and ran down about 14 feet; that sea water entered the engine room of the vessel through this crack." (Finding IV) (The finding also listed a failure of the steering system; the taking of water in the No. 1 hold; the coming adrift of the deck cargo; and the No. 2 hatch being open and full of water.)

3. "That the foregoing faults, failures, breakdowns and defects set forth in the preceding finding IV, together with the crack sensitiveness of the vessel to the extreme cold weather * * * were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage." (Finding V)

4. The crack sensitiveness mentioned was "by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired." (Finding V)

5. This unseaworthy condition "prevented her from meeting the expected and to be anticipated weather conditions." (Finding V)

6. This unseaworthy condition "proximately caused her sinking with the total loss of the vessel." (Finding V)

7. "That the evidence is insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy at the inception of her voyage, and the Court finds that the petitioner did not use the due diligence required by law to make the vessel seaworthy and to entitle it to exoneration from liability." (Finding VI)

We accepted these findings and held that States Steamship Company had not sustained its burden of proving that it was entitled to limitation of liability, saying (1957 A. M. C. p. 2282):

"The reason there is no basis for the limitation here is that the only persons whose negligence could have operated to bring about the unseaworthy condition, the only persons to whom the lack of due diligence could possibly be charged, were persons who were managing officers of the corporation. The court not only did not find that the failure to exercise due diligence was that of minor or subordinate employees, but the court could not have made such a finding.

"The only persons who were on the scene and had anything to do with these factors of unseaworthiness were managerial employees."

The Steamship Company insists that we erroneously misinterpreted the trial court's findings of fact. It asserts that the court's finding VI, (No. 7, above), was a finding relating to the Steamship Company's claim for *exoneration*; that it had no relation whatever to a question of limita-

tion of liability or the question of privity and knowledge with which the court below dealt in its finding VII.[1]

The Steamship Company argues that in drawing our conclusions we have set forth a broad rule that in any case where the Steamship Company fails to use due diligence to make the vessel seaworthy at the inception of her voyage, limitation must be denied. We did not so hold.

There is respectable authority which would warrant the holding that where the circumstances are such that the owners or managing agents have a duty to act to see that [1778]
the vessel is made seaworthy, a neglect or failure to take such action will require denial of limitation. Mere instructions to subordinate employees will not suffice to give the owner the benefit of the limitation act. Such a case was *Spencer-Kellogg Co.* vs. *Hicks*, 285 U. S. 502, 510, 1932 A. M. C. 503, where limitation was denied because the manager, although he had given appropriate instructions to the master, had not followed up by inquiries or personal inspection himself. The court said (285 U. S. p. 510, 1932 A. M. C. p. 507): "Before allowing the ferriage operation he was under obligation to assure himself by inquiries or by personal inspection that the *Linseed King* should not incur the hazard of colliding, as she did, with ice floes in the river. * * * The owner was therefore chargeable with negligence in not taking measures for the safety of the passengers which the weather conditions required."[2] Mere non-

[1]Finding VII was as follows (1956 A. M. C. p. 1812): "That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner."

[2]See GILMORE & BLACK, *The Law of Admiralty*, 1957, p. 701: "Some duties appear to be 'nondelegable,' which is a way of saying that the corporation will be conclusively presumed to have 'privity or knowledge' of the breach, or, more directly, that the corporation will

action on the part of managing agents in their allowing subordinates to prepare a ship for departure will not serve to excuse the owner from any portion of his responsibility if the knowledge of the managing agent is such that they ought to inquire and inspect. *Williams S. S. Company* vs. *Wilbur* (9 Cir.), 1926 A. M. C. 32, 9 F (2d) 622.[3]

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There is no doubt that Vallet, the port engineer, did have a duty to make inquiries and personal inspection at the time the *Pennsylvania* started her voyage. But that circumstance was not alone the basis for our decision. The court's finding of lack of due diligence, it is true, refers to exoneration.[4]

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not be entitled to limit its liability in such a case no matter what the state of proof on actual privity or knowledge.

"The nondelegable duties are all facets of what is referred to in other contexts as the shipowner's duty to provide a seaworthy ship or at least to use due diligence to do so. 'Seaworthiness' is a word which in recent years has suffered from a strange expansion of meaning. Its primitive sense was no doubt what any English-speaking person, not a member of the admiralty bar, would expect it to mean today; that the ship in question must be, in the language of the customary charter-party warranty, 'tight, staunch, strong and well and sufficiently tackled, appareled, furnished and equipped.' *If a corporate owner fails to use due diligence to send forth his ship seaworthy in that primitive sense and the unseaworthiness proximately causes loss or damage, the owner will be denied limitation.* The corporate owner, unlike the individual owner, will not be allowed to escape liability for breach of his basic duty by delegating either to a master or to subordinate shore officials." (Emphasis added.) The authors cite as authority for this position, *Grace & Co.* vs. *Charleston Lighterage & Transfer Co.*, 1952 A. M. Co. 689, 193 F. (2d) 539 (4 Cir., 1952).

[3]This and other similar cases were explained by Mr. Justice BRANDEIS in *Earle & Stoddard* vs. *Wilson Line*, 287 U. S. 420, 427, 1933 A. M. C. 1, 4, in a footnote as follows: "In all the cases where immunity from liability for damage by fire was held to be lost because of neglect of the owners, the courts have based their finding of neglect on the action of the owners or managing agents, or upon their failure to see that action was taken where it was their duty to act."

[4]We did not question that in making its finding VI, quoted above, the court below had in mind the provisions of section 3(1) of the Carriage of Goods by Sea Act providing: "The carrier shall be bound, before and at the beginning of the voyage, to exercise due

But it must necessarily be related to the facts of this particular case. Here one of the factors of unseaworthiness was the crack sensitiveness of the vessel and it in turn existed by reason of a former 22 foot crack in her deck. It is not material here whether the words "by reason of" were meant to say that the former crack caused the later crack, or whether the meaning is simply that her crack sensitiveness was revealed by the former 22 foot crack. In any event, and as a simple fact found by the court, the vessel was unseaworthy because of the crack sensitiveness.

The question next is: whose lack of due diligence sent a ship thus unseaworthy to sea? The only conclusion that any one would be entitled to draw from the evidence in this record was that Vallet was the one man so chargeable. This is not a case where it could be speculated that Vallet was off on vacation or not on duty when the failure to "use the due diligence required by law to make the vessel seaworthy," took place. Our former opinion sufficiently details what the evidence showed as to Vallet's connection with this crack problem from beginning to end and his complete knowledge of the crack sensitiveness of the vessel. It is impossible to disassociate Vallet from all of this under any possible view of the evidence. He permitted the vessel to sail on her fatal trip, and if, as the court found, there was lack of due dili-
[1780]
gence to make the vessel seaworthy in these respects, that lack of due diligence was in major part that of Vallet.

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diligence to * * * (a) make the ship seaworthy," and section 4(1) providing that neither carrier nor ship shall be liable for loss resulting from unseaworthiness "unless caused by want of due diligence on the part of the carrier to make the ship seaworthy * * * in accordance with the provisions of paragraph (1) of section 3." Of course, in making such a finding, a court in some other case might well predicate its finding of failure to use due diligence upon evidence that the negligence or fault was that of any agent whatever, regardless of rank, provided the agency was sufficient to give rise to an application of the rule of *respondeat superior*.

Some complaint is made that we improperly treated Mr. Brenneke as an executive officer.[5] Whether he was or not is immaterial here for in the sending forth of a ship known to have the crack sensitiveness of this one Vallet was the prime actor and for our purposes here it was immaterial whether as one who participated in that action and contributed thereto Brenneke was a managing officer or a minor employee.

It is thus apparent that the district court found there was negligence. After noting that that finding was abundantly supported by evidence, we have by our decision pointed out that upon this record such negligence was necessarily the negligence of Vallet. Accordingly we hold limitation of liability must be denied.

The burden of proof of absence of privity or knowledge is upon the shipowner. *Coryell* vs. *Phipps*, 317 U. S. 406, 409, 1943 A. M. C. 18. (And see cases cited in GILMORE and BLACK, p. 705). Our holding is, like that in *Triple A Machine Shop* vs. *Waterman Steamship Corporation* (9 Cir.), 1955 A. M. C. 1045, 221 F. (2d) 916, that "the shipowner did not sustain its burden of proof."

This privity or knowledge which results from Vallet's connection with the preparation of the vessel for departure results in part from the principles underlying the limitation act itself. In *Spencer-Kellogg Co.* vs. *Hicks, supra*, 285 U. S. p. 511, 1932 A. M. C. p. 508, the court noted the necessary distinction between the shipowner's responsibility for the neglect of sea-going employees and his responsibility

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[5]The testimony as to Brenneke, given by Vallet, was as follows: "Q. During the month of December and January of 1951 and '52 would you say that Mr. Brenneke was your assistant marine superintendent? A. He was my assistant. We don't have the title of assistant marine superintendent. Q. You were just marine superintendent; is that correct? A. Yes. Q. But you do have the title of assistant port engineer? A. Yes. Q. And Mr. Brenneke was the No. 1 man under you; is that correct? A. Yes."

in respect to his shoreside organization. Meeting an argument that in that case the fault was that of a competent master to whom instructions had been given and that the owner had done its full duty, the court said: "Cases such as *La Bourgogne*, 210 U. S. 95, which involved the master's failure to obey rules and instructions when on the high seas and disaster attributable to such fault, are cited. But there is a vast difference between the cases relied on and the instant one. The launch was used for ferriage over a distance of about a mile and a third. She was known to be unsea-
[1781]
worthy and unfit if there was ice in the river. There is no analogy between such a situation and that presented in the cited cases where the emergency must be met by the master alone. In these there is no opportunity of consultation or cooperation or of bringing the proposed action of the master to the owner's knowledge. The latter must rely upon the master's obeying rules and using reasonable judgment. The conditions on the morning in question could have been ascertained by Stover, if he had used reasonable diligence, and we think the evidence is adequate to support the finding that the negligence which caused the disaster was with his, and therefore with the owner's, privity or knowledge." The reason for this "vast difference" there stated, is well described by GILMORE and BLACK as follows (p. 696): "The principle of the Limitation Act is the same as that found in the Harter Act and the Carriage of Goods by Sea Act: because of the extraordinary hazards of seaborne commerce and because the owner can exercise only a nominal control over his 'servants' once the ship has broken ground for the voyage, the owner should be entitled to exoneration from liability, or at least to a limitation of liability, for whatever happens after the ship has passed beyond his effective control. *Contrariwise, he should be held to liability for all loss resulting from his failure to*

exercise effective control when he had the chance.[6] Although the Limitation Act uses a vocabulary different from that of Harter and Cogsa, the concept of liability is the same: the shipowner is not chargeable with 'privity or knowledge' or with 'design or neglect' when he has used 'due diligence' to furnish a seaworthy ship; he is so chargeable when he has failed in his duty of 'due diligence' and has sent out a ship unseaworthy in some respect that proximately contribute to the loss."[7]

[1782]

Petitioners make reference to the portions of the evidence in the record which they say tends to show that the steel of the *Pennsylvania* was no different from the steel on all welded ships built at the same time. Reference is made to technical reports and to testimony of witnesses who surveyed and inspected the ship or samples of her steel tending to show that there was no lack of due diligence in making

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[6]Illustrations of this failure to exercise effective control when the owner "had the chance," are found in *Cleveco* (6 Cir.), 1946 A. M. C. 933, 946, 154 F. (2d) 605, 613: ("* * * knowledge means not only personal cognizance but also the means of knowledge—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it."), and in *Great Atlantic & Pacific Tea Co.* vs. *Brasileiro* (2 Cir.), 1947 A. M. C. 306, 312, 159 F. (2d) 661, 665 ("The measure in such cases is not what the owner knows, but what he is charged with finding out.").

[7]The authors add the following interesting comment: "The foregoing comment is not meant to suggest that courts customarily cross-cite Limitation Act cases and Harter Act or Cogsa cases. There is indeed authority for the proposition that the Limitation Act imposes on the shipowner a lower standard of care than do the Harter Act and Cogsa; that is, failure to have exercised 'due diligence' under Harter or Cogsa does not automatically deprive the shipowner of his defense under the Fire Statute or the Limitation Act. No recent cases, however, have restated the doctrine of the lower Limitation Act standard. If the older cases are in time overruled or forgotten, in line with the discernible judicial trend to narrow the Limitation Act by construction, the situation would then be that, if the carrier is liable to cargo under the Harter or Cogsa, it would also lose its privilege under the Limitation Act. As to cargo liability, then, the Limitation Act would be in effect superseded by Harter and Cogsa, and would continue to be of importance with respect to collision, loss of life and personal injury claims."

the ship seaworthy. There is no question but that the record contains a substantial amount of evidence to that effect. The difficulty is that the trial court rejected it in the findings which we have quoted above. When the court found that the proximate cause of the sinking was the *Pennsylvania's* unseaworthiness; that the crack sensitiveness by reason of her former 22 foot crack in her deck was a factor of unseaworthiness culminating from her unseaworthy condition at the inception of her voyage and that there was a lack of due diligence to make the vessel seaworthy, it rejected the contrary evidence now cited to us in the Steamship Company's petition for rehearing.

It is suggested that there is something in our opinion to the effect that all welded steel vessels are unseaworthy. As authority for this assertion petitioner quotes from a television broadcast in which the broadcaster purports to construe the meaning of our decision. The broadcaster is mistaken; we did not so hold.

The petition contains a table taken from one of the exhibits in the case showing the number of fractures and casualties in some 4694 ships built by the Maritime Commission. This table shows a substantial number of fractures and casualties. On the basis of this, petitioner asserts that in respect to the likelihood of cracks and fractures, the *Pennsylvania* was exactly like all other welded steel ships and is no different from the bulk of dry cargo tonnage in the American Merchant Marine.

But the 127 cases of serious casualties listed in this
[1783]
table do not contain any Victory class vessels such as the *Pennsylvania*. The *Pennsylvania* was unique in its prior Class I hull fracture on Voyage V. The testimony showed that there had been over 2000 shipping years of experience with Victory ships and there was no history of a Class I casualty on such a ship. The failure of due diligence found by the court was in sending a ship known to be crack sensitive upon that voyage.

The suggestion that our decision puts all welded ships out of business over the northern route is wholly unwarranted.

The petition for rehearing is denied.

In this effort to clarify our decision we believe we have at least somewhat improved upon the statements made by our Nov. 15, 1957, opinion. It is ordered that that opinion be amended by striking therefrom the following portions:

1. The two paragraphs, appearing on page 3 of the slip sheet opinion, beginning with the words "It is noted," and concluding with the words "less than managerial rank." (1957 A. M. C. p. 2281.)

2. The first sentence immediately following those paragraphs; and

3. The first paragraph on page 4 of the slip opinion, beginning with the words "It is found," and concluding with the words "limitation of liability." (1957 A. M. C. p. 2281.)*

[1784]

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*NOTE: The portions stricken read in full as follows:

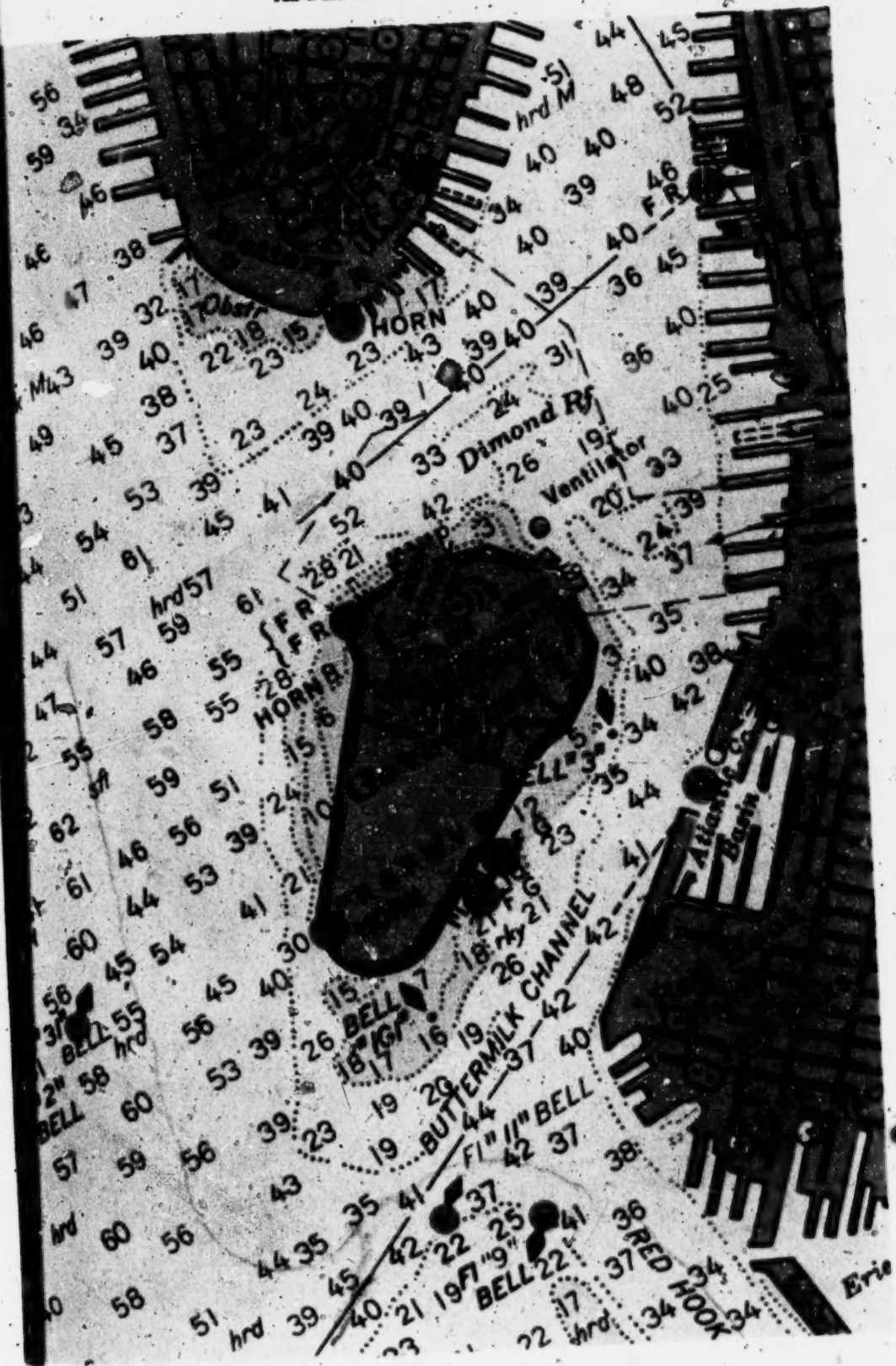
"It is noted that the finding is that there was no showing that petitioner used due diligence which was required and that petitioner did not use due diligence to make the vessel seaworthy. There is no finding here or elsewhere that the lack of due diligence or negligence was that of any person of less than managerial rank. On the contrary, the finding is that the lack of due diligence was that of the petitioner.

"In the second paragraph of our former opinion we stated that the court held 'that the employees of the company had not exercised due diligence.' That statement needs modification. That was not the trial court's holding, and it could not so hold, if the word 'employees' means employees of less than managerial rank.

"It is obvious that Finding VII is completely inconsistent with Finding VI[illegible]ist quoted."

"It is [illegible]und that the unseaworthy condition was due to petitioner's lack of due diligence, but the findings fail to point to any individual, not a managerial employee, who it could be said was solely responsible for this lack of due diligence. This was a fatal defect in the findings and it exposes a lack of basis for the court's conclusion that there should be limitation of liability."

APPENDIX D


HORN
Dimond Rf
Ventilator
HORN
BELL
BUTTERMILK CHANNEL
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F1" 9" BELL
RED HOOK
Erie
Basin